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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 90

DAVID B. GOODMAN and THERESA L. GOODMAN; ESTATE OF HERBERT S. GOODMAN, Deceased; GLADYS C. GOODMAN, Executrix, and GLADYS C. GOODMAN, surviving wife; HARRY MABEL, surviving husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, Executor,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

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Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

Petitioners pray that a writ of certiorari issue to the Court of Claims of the United States, to review its judgment, entered on February 16, 1968.

Citations to opinions below

The opinion of the Court of Claims has not as yet been published. Appended hereto is a copy thereof (Appendix A).

Said opinion reproduces the Commissioner's Findings of Fact. Therefore, in printing said Commissioner's Report (Appendix B), we do not repeat them, but refer to and incorporate them as they are set out in the Court of Claims' opinion (Appendix A, pp. 42-56).

The Commissioner's Supplemental Report and Opinion is annexed hereto as Appendix C.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., § 1255.

The jurisdiction of the Court of Claims was invoked under 28 U.S.C. § 1491.

Questions presented

1.

Did the members of the law firm of Goodman and Mabel* who, either as partners in the acquisitions or as stockholders in corporations, participated with others in the ownership of real estate interests, hold their aliquot interests in said real estate ownerships, "primarily for sale to customers in the ordinary course of his [their] trade or business", so that, when—after holding the same for more than six months—said partnerships or corporations sold the properties in which said Petitioners had said respective aliquot interests, the net profits thereof were taxable as long-term capital gains, as reported by the law firm, or as ordinary income, as determined by the Court of Claims?

2.

Should the aforesaid inquiry be determined over-all, or separately, for each year, as to each acquisition and its disposition—*a fortiori*, when the real estate interest acquired and owned by the law firm and its members was only a participation with others, who controlled the property and its disposition?

3.

May that which should and would be regarded as an investment, be deemed part of dealing, merely by reason of

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* Since the Petitioners prosecute their refund claims in the right of members of a law firm, practicing their profession as such, it will be convenient hereinafter, for the most part, to refer to them as the "law firm."

the fact that it becomes one of a number of transactions, which either alone or among others, would be regarded as an investment? If so, at what point is the transition and conversion retrospectively completed, from individual successive investments to over-all dealing?

As below set out, the answers to these questions have produced conflicting decisions in the several Courts of Appeals (*infra*, p. 12).

The statutory provisions involved

Internal Revenue Code of 1939:

Sec. 117. (a) Definitions. As used in this chapter—

(1) Capital assets.

The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; * * *

(2) Short-term capital gain. The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income; * * *

(4) Long-term capital gain. The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income; * * *

(j) Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business. * * *

(1) Definition of property used in the trade or business.

For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character

which is subject to the allowance for depreciation provided in section 23 (l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *.

(2) General rule. If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

Internal Revenue Code of 1954:

Sec. 1221, Capital Asset Defined.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; * * *

Sec. 1222. Other Terms Relating To Capital Gains And Losses. For purposes of this subtitle—

(1) Short-Term Capital Gain.—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income. * * *

(3) Long-Term Capital Gain.—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income. * * *

Sec. 1231. Property Used In The Trade Or Business And Involuntary Conversions.

(a) General Rule.—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

(b) Definition of Property Used in the Trade or Business.—For purposes of this section—

(1) General Rule.—The term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not—

(A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year,

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *.

Statement

The law firm (Petitioners herein) do not raise any mere question of fact. They rest on the factual findings made by the Court of Claims. They argue, however, that said find-

ings do not justify that court's ultimate finding that the law firm's profits at issue should be taxed as ordinary income—which we contend is erroneous because it is predicated on a misconception and misapplication of law. Accordingly, relying, for the purposes of this petition, on the factual findings, and predicating this petition upon the basic public-interest concepts underlying the grounds formulated in the two dissenting opinions (*infra*, pp. 32, 37), as well as upon the specific criticisms therein made, Petitioners trust that an examination of said opinions, *assuming the facts, as found*, will demonstrate that the judgment of the Court of Claims was erroneous because it failed to apply appropriate rules of law.

The refund claims

Petitioners, David and Theresa Goodman, seek to recover income taxes and interest paid for the years 1953, 1954 and 1955, in the amounts of $849.61, $2,964.60 and $7,257.81, respectively; the Petitioners Harry Mabel and the Estate of Florence Mabel seek to recover income taxes and interest paid for said years, in the amounts of $849.61, $2,892.89 and $6,504.92, respectively; and Petitioner, Gladys C. Goodman (now Gladys C. Dubin), as Executrix of the Estate of Herbert S. Goodman, seeks to recover income taxes and interest paid in the amounts of $623.23, $2,038.90 and $5,544.31, respectively, for said years 1953, 1954 and 1955.

Proceedings Below

As shown by the Court of Claims' majority opinion, the case was referred to a Commissioner, who reported against Petitioners, in a report and a supplemental report and opinion, filed respectively on February 2, 1965 and February 15, 1967 (Appendices B and C). After submission of briefs and oral argument on Petitioners' exceptions, the Court of Claims, on May 16, 1966, acceded to Petitioners' request that the case be remanded to the Commissioner, in view of this Court's decision in *Malat* v. *Riddell* (383 U. S. 569), which was rendered after the Commissioner's report

(containing his findings) had been filed (Appendix B)*. The Court of Claims remanded the case, and authorized the Commissioner, "to the extent appropriate, to make new or additional findings in the light of that decision, with leave to the trial commissioner, if he deems it necessary or desirable, to allow the parties to present further evidence" (Appendix A; Appendix C). However, the Commissioner declined to reopen the case, with the result that the record remained as before (*infra*, pp. 59-60).

The Court of Claims modified and as so modified adopted the Commissioner's findings and his recommended judgment (Appendix A).

The facts as found

The facts as found by the Commissioner, and as modified and approved by the Court of Claims (Appendix A)**, are as follows:

David Goodman was admitted to the practice of law in the State of New York in 1921; Harry Mabel in 1920, and Herbert Goodman in 1929. From 1929 and through the relevant years of 1953, 1954 and 1955, they were members of the New York bar, and practiced together as partners under the firm name of Goodman and Mabel, with offices in New York City (Finding No. 7). They specialized

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* This Court held, in *Malat*, that "primarily" meant "principal", and must not be equated with "substantial".

** The only modifications made by the Court of Claims, were, in accord with the Commissioner's Supplemental Report, as follows:

1. The Court of Claims exscinded the following from the conclusion of the Commissioner's Finding No. 28:

> "It is not possible from the evidence to determine how many of plaintiffs' transactions were influenced by the foregoing considerations to the complete exclusion of sales for profit. Both profits and losses were occasioned where some of the foregoing factors were present but gains far exceeded losses over-all."

2. The Court of Claims exscinded the following from the conclusion of the Commissioner's Finding No. 36 ["Ultimate Finding"]:

> "or as an adjunct of the regular business operations of the partners."

in the practice of real estate law. David Goodman's practice was limited to the practice of such law. The other members of the firm handled other and related legal matters (Finding No. 8). Harry Mabel and Herbert Goodman so devoted themselves to the practice of law (Finding No. 14). As a part of their practice, the law firm represented clients who bought and sold real estate and placed mortgages on real estate.

The law firm's opportunities in real estate arose through contact with clients who were investors,—some of them speculators in real estate. Said clients invited the law firm to participate with them in real estate ventures, and, beginning in the 1930's, the law firm, in each case as it saw fit, did so (Finding No. 9). The acquisitions of participating interests were of income-producing property.

The law firm took part in only 3 to 5 per cent of the real estate transactions in which they acted as lawyers. At all times, they alone decided, as to each proposal, whether they would participate in opportunities offered by their clients (Finding No. 10). They were never licensed real estate brokers, nor did they advertise or act as such. Nor did they seek purchasers. They never advertised for opportunities to buy or sell interests in real estate (Finding No. 10). They never managed the properties.

Those with whom the law firm bought interests in real estate were usually composed of groups of from four to six persons. In some cases, the groups were larger, consisting of ten to twenty-five participants—in one case, ninety-five. The participants were often different persons, but often the same. There were some clients who would not buy an interest in a real estate venture unless the law firm participated—such was their confidence in the law firm's judgment in such matters (Finding No. 11).

Because of his expertise in real estate, gained from his practice as a lawyer, it was usually David Goodman who recommended prospective ventures for his partners' consideration. He devoted as much of his time as he felt was required—during the week, on evenings, or on week-ends.

He kept account of the moneys received by the law firm, as their return from their investment in real estate ventures (Findings Nos. 13 and 14).

The cash flow, representing income generated by property investments and return of capital, was substantial. Cash receipts amounted to $220,730.61 in 1953; $191,183.35 in 1954, and $245,897.25 in 1955 (Finding No. 14). The adjusted cost basis of the law firm's real estate interests exceeded $397,000. The market value was greater (Finding No. 26).

When the law firm purchased an interest in real estate, they held it either in partnership or corporate form. When held as a partnership, title would be taken in the names of two or three of the participants as tenants-in-common. The law partnership was represented by one of its members, who, as each investment was made, issued a letter to his partners, in which he stated that he held aliquot title for their benefit. The law firm's ownership interest in each venture varied from 2 to 50 per cent. Normally, their partnership interest ranged between 15 and 25 per cent (Finding No. 15).

The law firm never vetoed or refused to consent to a sale when the other participants desired to dispose of the property (Finding No. 16).

All expenses were borne by each principal, in his *pro rata* share, according to his percentage of ownership (Finding No. 20).

Proceeds of the venture were held in a special account. A special checkbook was kept for the account (Findings Nos. 21 and 22).

The law firm was paid for legal services which they rendered (Finding No. 24).

The law firm sold or otherwise disposed of certain of its interests in real estate during the years 1953, 1954 and 1955 and, as a result, realized gains and losses reportable for federal income tax purposes. The law firm reported income on the calendar-year basis and used the cash receipts method of accounting. The law firm filed form 1065—United

States Partnership Returns of Income—for the years in issue and reported the gains and losses resulting from the sale or disposal of its interests in real properties as gains or losses on the sale or disposal of capital assets. The real properties, the sale or disposal of which gives rise to the gains on which tax is here in issue, were held by partnerships in which the law firm of Goodman and Mabel had owned an interest for 6 months or more (Finding No. 18).

The law firm's transactions and the cost thereof and income therefrom are set forth in Findings Nos. 19, 25, 26, 27 and 29. They show many investments, held over many years.

The volume of the law firm's activities in the real estate market was such that their disposal of realty interests was motivated by a wide variety of factors, independent of any motive of profit. Some of these factors were as follows: neighborhood deterioration; need for extensive repairs; death of a co-owner; inability of co-owners to get along; property could not be developed for purpose for which acquired; building not well located for commercial purposes; problems with tenants; refinancing difficulties; misrepresentation by seller as to income and expenses; poor rental income; inability to obtain finances necessary to close contract and obtain title; zoning difficulties (Finding No. 28).

An analysis of the foregoing shows the following:

The law firm invested in *income-producing real estate almost to the complete exclusion of any other type of personal investment* (See Plaintiffs' Requested Findings 29, 30). Very rarely did they buy unimproved land. They devoted little time or money to making improvements on such land (Finding No. 36). *They did not subdivide or develop land.*

The law firm were minority participants in approximately 50 real estate syndicates, during each of the years in question. They held many properties for long periods—indeed, for years (Finding No. 19). They never vetoed or consented to a sale, when the other participants decided to sell. Many factors entirely independent of their own particular desires, caused the disposition of real estate invest

ments (Finding No. 28). For example, in three different instances, the sponsor of the partnership died, with the result that the partnership was terminated. In two instances, the property was sold because the partners could not agree on the method of operating it. In two other instances, the investment was sold at the insistence of the sponsor of the partnership. In six instances, the investment was sold because of inability to obtain or to keep a satisfactory tenant for the property. In two instances, difficulties with the Rent Control Commission, and imposition of building violations on the property, motivated the sale. In two instances in which the properties had been held for rental income from 1938 to 1940, the law firm disposed of them because the buildings had become run down and the neighborhoods had changed and become deteriorated.

The law firm reported net profit from the sale of realty interests during the period 1953 through 1955, as capital gain from the sale or exchange of capital assets. The Commissioner of Internal Revenue assessed deficiencies against the law firm, on the grounds that they were dealers in realty and that the interests in real property held by them were held primarily for sale to customers, in the ordinary course of a trade or business (Finding No. 34). The law firm paid the asserted deficiencies, and filed timely claims for refund. These claims were denied by the Commissioner of Internal Revenue (Finding No. 33).

Argument and reasons for allowing the writ

In obedience to this Court's mandate, as formulated in its rules, we do not embark upon extended argument and detailed citation of authorities. Rather, as we conceive it our duty to do, we address ourselves to the task of satisfying this Court that, whatever may be the ultimate decision of this controversy, which divided the Court of Claims by a vote of three to two, the case deserves review, so that, in the public interest and that of the professions generally,

a definitive decision may be made by this Court, to light the way for the future.

Conflicting decisions in the Courts of Appeals

The application of the statutes involved has, in analogous situations, produced conflicting results in the several Courts of Appeals.

So, in *Gamble* v. *Commissioner* (242 F. 2nd 586 [CA 5, 1957]), the Fifth Circuit held that a lawyer who ventured in real estate, must pay a tax on ordinary income.

So, also, was it held, as to lawyers, by the Seventh Circuit, in *Frankenstein* v. *Commissioner* (272 F. 2nd 135 [CA 7, 1959]), and by the Third Circuit, in *Saltzman* v. *Commissioner* (14 T.C.M. 69, affd. *per curiam* in 227 F. 2nd 49 [CA 3, 1955]).

On the other hand, in a case strikingly similar to that at bar, and also with respect to a lawyer, it was held by the Ninth Circuit as we contend (*Austin* v. *Commissioner*, 263 F. 2nd 460 [CA 9, 1959]). It was the "primary" motivation, which governed.

The problem arises, and its solution becomes ever more complex and confused, because what is or is not entitled to capital-gains status has become a matter of uncurbed administrative discretion, exercisable without predictable legal guidelines, and incapable of projection in advance.

Capital gains or ordinary income

This Court has not directly passed on the problem here presented.

In the *Malat* case, this Court decided only the meaning of "primarily", and mandated that it was not to be equated with "substantial". Here, in addition, the issue is as to whether a participation with clients may be equated with clients' transactions with mere sellers or buyers of the underlying properties, resulting, as it has, in the case at bar, in confusion with the statutory category of "customers"; and by what ascertainably certain standards "investments" may be deemed converted into a "trade or business". Indeed, the Court of Claims' decision actually contravenes this Court's decision in the *Malat* case, be-

cause, underlying the Court of Claims' ruling that frequency of successive investment retroactively makes them all a "business" is the same confusion of what is "substantial" with what is "primary." We say, "confusion", because in the *Malat* case, this Court defined "primarily", appearing in the same statute, to connote, not cumulated quantity or volume of activity—equated to "frequency" of transactions—but the taxpayer's subjective object and function, i.e., whether with purpose to acquire and sell property as incident to every-day occupation, or, on the contrary, to acquire and hold for investment. By that standard, this Court concluded that the "primary" concept embraced, not activities which were "substantial", but rather activities which were "of first importance" or "principally" (p. 571) of concern to the participants, whatever might be their every-day labors in their own vineyard.

Such was this Court's decision, in a setting in which the issue was as to whether a single real estate venture, as it terminated in subdivision of the land involved, and its sale, was to be deemed one for "profits and losses arising from the *every-day* operation of a business", or "the realization of appreciation in value *accrued over a substantial period of time*" (p. 572).

While such is here part of the issue, it is not the whole of the complex presented. We have here, in this aspect, the ultimate question as to whether a partnership or stock interest in real estate—over which an owner of an aliquot interest has neither sole control nor management, nor veto as to whether or not the over-all property investment should be sold—may be deprived of its character as a participating investment, merely because those who control the real estate decide to sell the subject property for a profit.

Just as, in the *Malat* case, this Court held that the word "primarily" must be "interpreted" in its "ordinary, everyday sense[s]" (p. 569), so here, the succeeding words in that same statute, contemplating sales to "*customers* in the *ordinary course* of his [their] *trade or busi-*

ness", may not be disregarded. The law firm was in business; they were lawyers. They did not have "customers". On the contrary, participating clients admitted them to *their* ventures. It was not in the "ordinary course" of the firm's profession as lawyers, to buy and sell real estate. Rather was it an incidental opportunity made available to them, by their clients, who invited them to participate in investments of surplus capital.

Nor were the law firm's investments in real estate the conduct of a "dual" business. The members of the law firm were not in business. They were investing surplus funds, which they were able to accumulate from earnings from their profession as lawyers. By their investments, they sought a favorable tax basis—such as is allowable to others, who are engaged in occupations in which earned income is not disadvantaged, as in the case of lawyers. The every-day professional services of an attorney are seldom richly rewarding; investments may well be. "Frequency" of investment transactions cannot be the test by which investments are converted into dealings, but rather whether the *primary* activity is that of attorneys, and each investment but an incident of that continued primary activity. If lawyers may not invest in real estate, as they and others may invest in stocks and securities, a quarantine is effectuated against investment in real estate, which the Congress did not impose.

Investment, in a tax sense, is not "business." As said in *Karnuth* v. *U. S.* (279 U. S. 231), in defining "business":

> "The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. * * * The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment." (p. 243)

It was not the purpose of the capital-gains legislation to abolish it as to real estate at some point unascertainable in advance, or to make investments in real estate a perilous adventure, the outcome of which would be determined by the exercise of a tax collector's undelimited discretion. On the contrary, it was the purpose of capital-gains legislation

to encourage investment, and even speculation. This, even by those who, otherwise, as to their primary activities, might be deemed "dealers". Each property interest stands on its own feet. (Cf. *Lobello* v. *Dunlop*, 210 F. 2nd 465 [CA 5, 1954]; *Burgher* v. *Campbell*, 244 F. 2nd 863 [CA 5, 1957]; *U. S.* v. *Bondurant*, 245 F. 2nd 265 [CA 6, 1957]).

The Commissioner's misapprehension of the rules of law applicable, appears from the Commissioner's Ultimate Finding:

> "The evidence establishes, through the totality of their actual purchases and sales, that plaintiffs held the subject real estate primarily for sale in the ordinary course of their business *or as an adjunct of the regular business operations of the partners.*" (*infra*, p. 55)

Assuming that the practice of law may be called a "business", the finding that the "subject real estate" was an *adjunct* of the regular business operations of the partners, certainly negatives that it was a separate or "dual" business". It is not surprising, therefore, that the Court of Claims exscinded the phrase "as an adjunct of the regular business operations of the partners". But, by so doing, it did not cure the basic defect in the Commissioner's rationale, which the Court of Claims adopted, i.e., of equating "frequency" with dealing. Thus, conceived in misapprehension of the law, the findings in their totality were oriented in error. And the Court of Claims itself was thus led astray.

The test of whether a taxpayer is a dealer ought to be whether he holds himself out as such and so conducts himself. The hallmarks of such a trade are readily ascertainable and demonstrable.

The impact of the decision at bar is not limited to the immediate controversy. For the decision forecloses investment and its long-term tax benefits, to the legal and other professions generally, including doctors, dentists and the like. Should the decision of the Court of Claims be permitted to stand, then, to invest in real estate, with proceeds stemming from professional earnings, is to embark upon a long and uncharted road. So, in the case at bar, it has

taken from 1953-1958 until 1968—more than ten years—to learn the tax doom. The result may be called the decision of a question of fact, but that decision—as this Court ruled in the *Malat* case—should be predicated upon a predictable standard and a proper conception of the law.

Separate appraisal of each transaction

The law on this subject is developed in the opinions of the dissenting judges (*infra,* pp. 32, 37). Therefore, further elaboration is unnecessary.

The principle involved—violated in the case at bar—is stated in *Municipal Bond Corporation* v. *Commissioner of Internal Revenue* (341 F.2nd 683 [CA 8, 1965]), as follows:

> "We also observe the taxpayer's purpose of holding property may vary with respect to different tracts. Upon the capital gain issue, purpose or intention must be determined with respect to each tract and such purpose may vary with respect to the different tracts. * * *" (pp. 689-690)

Particular point is given to this fundamental criticism by the Court of Claims' modification of the Commissioner's Finding No. 28, which in effect confesses its omission to comply with this requirement. The part of the finding which the Court of Claims omitted is as follows:

> "It is not possible from the evidence to determine how many of plaintiffs' transactions were influenced by the foregoing considerations to the complete exclusion of sales for profit. Both profits and losses were occasioned where some of the foregoing factors were present but gains far exceeded losses over-all."

In the part thus omitted, the Commissioner professed inability to make separate findings as to each property interest. Yet, on remand, he refused to take further evidence (*infra,* p. 60). And the Court of Claims did not correct that seriously prejudicial omission, when it merely exscinded the Commissioner's acknowledgment of his nonfeasance.

Error, therefore, permeates the judgment sought to be reviewed.

Immaterial findings

We pause briefly to comment upon the immaterial findings made below, which do not have any legal significance. Surely, whether the law firm kept books, had an account, and segregated investment funds, does not convert an investment into a trade in the course of business.

So, in *Higgins* v. *Commissioner* (312 U. S. 212 [1941]), though this Court found the facts to be that:

> "The offices kept records, received securities, interest and dividend checks, made deposits, forwarded weekly and annual reports and undertook generally the care of the investments as instructed by the owner. * * * Petitioner did not participate directly or indirectly in the management * * *" (p. 214),

it nevertheless held that such circumstances, i.e., that "The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments" (p. 218), did not constitute the doing of business nor justify a deduction for business expense.

So, also, the Ultimate Finding that the testimony of the law firm, that they were "motivated primarily by interest in rental income * * * is contrary to the weight of the evidence". (*infra,* p. 55), amounts to nothing more than a mistaken legal conclusion from the evidence—erroneous because (1) the law firm's testimony was uncontradicted that such was the motive; and (2) the finding was formulated in misapprehension of the applicable law.

So also as to the criticism that the law firm had not brought their clients to the witness stand. Why—bearing in mind that the transactions involved were established without contradiction, and that the subject of inquiry was not the clients' *but the law firm's participation!*

The foregoing are the basic observations underlying the more specific criticisms made in the opinions of the dissenting judges of the Court of Claims. Because there is no need of either further argument or further elaboration of

the authorities cited—and to do so would only be to repeat what has been so adequately done below—we rest upon the criticisms of the majority opinion, made in the dissenting opinions, each of which we shall now briefly discuss.

The majority opinion of the Court of Claims

The opinion of the majority shows its congenital defect, in that, notwithstanding this Court's opinion and decision in the *Malat* case—which intervened between the Commissioner's report and the Court of Claims' judgment of modification and approval, in the case at bar—the court persisted in deciding the case without due regard for the standards enunciated in the Congressional mandate, as interpreted in the *Malat* case. For the erroneous interpretation of "primarily" to connote activity which is "substantial"—disapproved in the *Malat* case—is equated by the denaturing of earlier investments, as "business", and downgrading said investments over-all, as the frequency of like investments increases, so that the "frequency" of investments—i.e., by quantity measurement test—retroactively converts "investments" into dealings.

So, the majority opinion emphasizes the substantial amounts reflected in cash flow; the number of corporations in which the law firm owned stock; the number of interests in realty partnerships and mortgage ownerships; and the number of transactions. Thus, to the majority of the court, it seemed a decisive factor that the law firm had large investments and many of them—though, admittedly, quantitative appraisal should not, by itself, be the basis for decision.

Influenced by the same undue emphasis on quantity measurement, the majority thought it of consequence that earnings from investments were often larger than income from professional activity. [But see the dissenting opinions' exposure of the misapprehension of the facts, *as found,* involved in such conclusion]. The test was wrong. It is nothing unusual to have the generous proceeds of "investment" outrun the meager rewards of professional labor. Such a result seems to be contemplated by our tax

structure under which earned income is less favored on the tax measurement scale than is speculative gain.

Thus identifying the size of the product of investment with its generating cause, and assuming that, when investment outruns earned income, the underlying transaction cannot be investment, but must be trading and dealing, the majority concluded that the law firm's transactions in real estate—if with "frequency and continuity" and profitable—constituted a "separate business"! At what point an investment thus takes on the character of a "business" in real estate, is not formulated; nor is it possible to discern any standard for drawing the line at which successive investments each become denatured overall. So characterizing the law firm's transactions as a "business", the majority saw fit to refrain from appraising each transaction, because, as it viewed the situation, each of said transactions, viewed retroactively, was a part of a continuing dealers' business. Though requested to do so, it, therefore, did not make separate findings as to each transaction.

Judge Skelton's dissent

With Judge Skelton, we submit that the undisputed facts, as reflected in the findings, do not—*as a matter of law*—permit of the conclusion reached by the majority. "The plaintiffs never had title to any of the real properties or mortgages in their own names. They took part in only 3 to 5 per cent of the real estate transactions in which they acted *as lawyers*. Their clients were the sponsors of the investments and invited plaintiffs to participate" (*infra*, p. 33). As further said in his opinion: "I do not consider that the 5 to 6 sales per year during these three years could reasonably be said to be so excessive in number as to be 'frequent' within the prohibited zone of the Internal Revenue Service so as to subject the profit therefrom to the ordinary income tax. Any successful businessman could reasonably be expected to dispose of at least a half dozen investments in the period of one year." (*infra*, p. 33).

Furthermore, Judge Skelton's criticism of the majority's misapprehension of the amount of the law firm's earnings,

cannot be gainsaid nor, as he points out, is there any justification for confusing ordinary income from other sources, with income from the practice of law (*infra*, pp. 34 ff).

And, last, but not least, there should have been some attempt at discrimination between the several transactions. Separate findings should have been made as to each. The authorities cited in the opinions of the judges of the Court of Claims do not permit of any doubt on this score (pp. 37, 38).

Judge Nichols' dissent

That dissent succinctly exposes the misapprehensions revealed in the majority's opinion. We quote:

> "The record reflects that the taxpayers, real estate lawyers, invested in various real properties as minority members of syndicates. They did not manage the properties. They did not, and their syndicates did not, develop, subdivide, or otherwise change the condition of the properties. They did not sell off large parcels in small lots at retail as a subdivider does. So far as appears the buyers were other investors like plaintiffs, purchasing entire buildings or comparable properties, substantially in the condition plaintiffs' syndicates had bought them, depreciation excepted. These transactions, if infrequent, would concededly be classic instances of capital investment. By some magic mere frequency is held to strip them of that character." (*infra*, pp. 37-41)
>
> * * *
>
> "I presume some sales are other than to customers, else the word is surplusage. In my semantics, the word fits the buyers of subdivision lots perfectly and the purchasers here involved not at all. However, we may assume arguendo that if a person is in a 'trade or business' the persons he sells to in the ordinary course of his business are 'customers.' * * * Whether mere passive investment in property in the hope it will appreciate in value is in this context a 'trade or business' if extensively engaged in is, alas, something else I am not clear about. If it is, it seems to me we confront the logical absurdity that a systematically pursued intent to realize capital gains deprives one of capital gains treatment. It denies the usual rule that a person may purposely arrange his transactions, as long as they have a business

purpose or other substantial economic reality, in the manner that incurs the lowest tax." (*infra*, pp. 41 ff.)

In the Court of Claims the Government attempted to buttress its argument that it was not error for the Trial Commissioner "not to write out his consideration of each individual property in his findings", by asserting that Petitioners' objections should be rejected because they never asked the Trial Commissioner to make findings on a property-by-property basis. The record of this case shows that the Petitioners submitted evidence and argued the law, not only on the basis that the law firm are not real estate dealers generally, but also on the basis that they were not holding the individual properties in issue for sale to customers in the ordinary course of business. At trial, the Petitioners testified at length as to the individual properties and the reasons for their disposition. (Tr. 66-80). Petitioners in their requested findings of fact 16 and 63, requested findings as to the gain or loss on and holding period of each property in issue and the reasons for disposition of the properties in issue; and, in their request for ultimate findings of fact, the Petitioners asked the Trial Commissioner to find that the interests in real estate in issue were not held primarily for sale to customers in the ordinary course of business. In Petitioners' reply brief, accompanying their objections to the Government's requested findings, they (on pages 5 to 10) enumerated the reasons for the disposition of the properties in issue and attached as an appendix to their brief a schedule showing each real estate partnership interest disposed of and the reason for such disposition. Reasons for the disposition of each property interest were set forth in Petitioners' Exceptions to the Commissioner's Report, and also in their Brief (on pages 12 to 15) filed with the Court of Claims prior to remand of the case to the Trial Commissioner. Finally, Petitioners, following remand of this case by the Court of Claims moved before the Trial Commissioner for leave to present further evidence on the grounds among others that, under *Municipal Bond Corporation* v. *Commis-*

sioner, 341 F. 2d 683 (8th Cir. 1965), it was necessary for the trier of the facts to make specific findings of fact and law with respect to the separate properties in issue.

The Trial Commissioner failed to make separate findings as to the individual properties not because the issue had not been properly raised, but because in his view the *Municipal Bond* case involved only the issue of the meaning of the word "primarily" and that, therefore, its ruling did not apply; furthermore, that the decision in *Tibbals* v. *United States*, 362 F. 2d 266 (1966) did not apply when "the number of properties and sales thereof is great and frequent". (Supp. Report 8-9)

Conclusion

The repercussions of the case at bar have been many and widespread. For its principle has impact on the Petitioners, not only as to past transactions, but as to those still to be had, with respect to property interests at hand—and, not only as to Petitioners, but as to the multitude of professional people who, up to now, had felt assured that investments with funds accumulated from earnings, as long as they had other *primary* interests, might be made, frequently, and with success, so that like others, they might have the benefit or reporting long-term capital gains.

Otherwise, an investment program in real estate or real estate interests, becomes illusory, and the policy underlying our capital-gains tax structure is, indeed, nullified.

To the end that the applicable rule may be definitely settled by this Court:

Petitioners pray that a writ of certiorari be granted.

JAY LEO ROTHSCHILD,
Counsel for Petitioners.

APPENDIX A

Opinion of the Court of Claims of the United States.

IN THE UNITED STATES COURT OF CLAIMS

No. 122-61

(Decided February 16, 1968)

DAVID B. GOODMAN and THERESA L. GOODMAN; ESTATE OF HERBERT S. GOODMAN, Deceased, GLADYS C. GOODMAN, Executrix, and GLADYS C. GOODMAN, Surviving Wife; HARRY MABEL, Surviving Husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, Executor,

v.

THE UNITED STATES.

Robert B. Hodes for plaintiffs. *Thomas N. Tarleau*, attorney of record. *Edwin H. Baker* and *Willkie Farr Gallagher Walton & Fitz Gibbon*, of counsel.

Knox Bemis, with whom was *Assistant Attorney General Mitchell Rogovin*, for defendant. *Philip R. Miller*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, SKELTON, and NICHOLS, *Judges*.

OPINION

Per Curiam: This case was referred to Trial Commissioner Marion T. Bennett with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in a report filed on February 2, 1965 and an opinion filed on February 15, 1967. Exceptions to the commissioner's findings and recommended con-

clusion of law were filed by the plaintiffs, and the case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court is in agreement with the findings, opinion, and the recommended conclusion of law of the commissioner, with modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case, as hereinafter set forth. Plaintiffs are, therefore, not entitled to recover and the petition is dismissed.

Chief Commissioner Bennett's opinion,* as modified by the court, is as follows:

After oral argument on the findings of fact of the trial commissioner and the submission of supplemental briefs, the court, on May 16, 1966, acceded to plaintiffs' request that this case be remanded for reconsideration in light of the decision of the Supreme Court in *Malat* v. *Riddell,* 383 U. S. 569 (1966), which was announced after the commissioner's findings were filed. The order of remand authorized the commissioner "to the extent appropriate, to make new or additional findings in the light of that decision, with leave to the trial commissioner, if he deems it necessary or desirable, to allow the parties to present further evidence."

On December 1, 1966, the court entered a further order directing the commissioner to submit recommendations for conclusions of law. Thereafter, the commissioner directed the parties, within a time stated, to make such submissions as they wished him to consider before he complied with the orders of the court. Plaintiffs, on January 3, 1967, filed a motion for leave to present further evidence. Plaintiffs subsequently requested and were granted oral argument on the motion. After hearing counsel and considering the motion and defendant's objections thereto, it was concluded

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(*c*).

that plaintiffs had failed to show that the extensive record already made did not contain an adequate presentation of their case.[1] It was also concluded that plaintiffs had no newly discovered evidence or evidence that could not have been presented at the trial already held, and the motion was denied by order entered January 31, 1967. This order also precluded the parties from making any further submissions to the commissioner on the grounds that all that could usefully be said had already been said, and undue delay would otherwise result. The considerations advanced by plaintiffs in their motion and oral argument and in their briefs and exceptions to the court will be considered hereafter.

The facts and the law clearly demonstrate, as indicated in the ultimate finding heretofore made, that plaintiffs held real estate principally for sale in the ordinary course of business and are not entitled to capital gains treatment of their profits, which thus bars them from recovery in this suit.

There is little disagreement about the basic facts, many of which are stipulated. From 1929 through the relevant years of 1953, 1954, and 1955, David and Herbert Goodman and Harry Mabel were law partners practicing in New York City under the firm name of Goodman & Mabel. They specialized in real estate law. Such practice led to opportunities to buy and sell realty and to place mortgages on real estate for their own interests, as well as for clients and associates. They were not licensed real estate brokers nor did they hold themselves out as such.

Plaintiffs always participated in real estate ventures together. They typically participated as part of a group or

[1] Plaintiffs' reply brief filed September 15, 1965, states: "The testimony during trial and taxpayers' briefs accompanying its requested findings of fact carefully, and in great detail, reviewed every sale of real estate made by taxpayers during the years in issue."

syndicate. The sponsor of the venture was usually a client. Sometimes these clients and sponsors were real estate brokers. On occasion, plaintiffs acted as agent for a venture and collected rents and made disbursements for expenses. They kept a separate "real estate" bank account for these activities.

Plaintiffs' real estate holdings were extensive, their value considerable, and the turnover constant. The cash flow, representing income generated by properties and return of capital, shows that in the year 1953 cash receipts were $220,730.61; in 1954 they were $191,183.35; and in 1955, $245,897.25. During the years 1950-58, plaintiffs owned stock in 4 to 11 realty corporations and held from 35 to 57 different interests in realty partnerships and from 6 to 21 realty mortgages. Their ownership interest normally ranged between 15 and 25 percent. The adjusted cost basis of plaintiffs' total ownership of real property interests between 1950 and 1958 exceeded $397,000, and the fair market value of their interests was much more. During the period 1950-58, plaintiffs averaged 36 transactions annually, comprising purchases and sales of interests in realty, realty corporations or realty mortgages.

During the years 1953, 1954, and 1955 involved in this suit, plaintiffs sold 32 different realty interests. Of these, 15 had been held less than 6 months and only 5 had been held as long as 5 years. In the 7 years 1950-56, plaintiffs' net income from the sale or disposal of their interests in real estate averaged $48,261.33 per year, and in 1 year exceeded $91,000. This may be contrasted to their $35,001.12 average annual net income from the practice of law during the same years. Their net income from other sources related to real estate is represented by interest on realty mortgages, dividends and salaries from realty corporations, and income from realty partnerships. Such income for the years 1950-56 averaged $44,919.39 per year. It is

apparent that during these years profits on purchases and sales of interests in real property constituted plaintiffs' largest single source of income. Plaintiffs treated this income from sales of property held more than 6 months as capital gains but it was held to be ordinary income and taxable as such by the Internal Revenue Service. The amounts of taxes paid, deficiencies assessed and paid, and refunds sought are stipulated by the parties and are not in dispute here.

The statutory test and issue in this case is whether the real property sold by plaintiffs was held "primarily for sale to customers in the ordinary course of * * * [their] trade or business."[2] If it was so held, the profits were taxable as ordinary income. Otherwise, the lower capital gains rate applies. Such a problem is basically one of fact to be decided on the particular circumstances of the case, *Browne* v. *United States*, 174 Ct. Cl. 523, 356 F. 2d 546 (1966), and no one circumstance or factor is controlling. *Bauschard* v. *Commissioner*, 279 F. 2d 115 (6th Cir. 1960).

In *Malat* v. *Riddell*, *supra*, the Supreme Court resolved conflicts among certain Courts of Appeals with regard to the meaning of the term "primarily" as used in the Internal Revenue Code of 1954. The Court said: "We hold that, as used in § 1221(1), 'primarily' means 'of first importance' or 'principally.'" The courts below had incorrectly construed primarily as meaning that a purpose may be "primary" if it is a "substantial" one.

In the instant case, the ultimate finding states, in part:

> * * * the weight of the credible evidence shows that they bought and held the subject property *primarily* for sale during the years in issue and during other relevant

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[2] The relevant statutory provisions are, with respect to 1953, §§ 117(a)(1)(A), and 117(j)(1)(B) of the Internal Revenue Code of 1939, and with respect to 1954 and 1955, §§ 1221(1) and 1231(b)(1)(B) of the Internal Revenue Code of 1954. These provisions of the 1939 and 1954 Internal Revenue Codes are identical insofar as pertinent to this case.

years. This is evidenced by the magnitude of their holdings, the extensive, frequent and continuous sales of the same, frequent short holding periods, the large amounts of money involved in these transactions, segregation of proceeds of sales for purchase of other real estate interests, and the profits derived from such ownership and sales as compared to plaintiffs' other income from the practice of law. Their testimony that their ventures in real estate were motivated primarily by interest in rental income and not in sales, is uncorroborated by the testimony of other co-owners and is contrary to the weight of the evidence. The evidence establishes, through the totality of their actual purchases and sales, that plaintiffs held the subject real estate *primarily* for sale in the ordinary course of their business. [Emphasis added.]

Individuals may conduct more than one business at a time and each will be taxed accordingly. *Crosswhite* v. *United States,* 177 Ct. Cl. 671, 369 F. 2d 989 (1966), collecting cases. Clearly, buying and selling realty was *one* of the businesses of the partners. Moreover, it was their biggest business, and the primary purpose of it was not investment but sales for profit in the ordinary course of business. We emphasize in particular the frequency and continuity of sales in reaching this conclusion. See, *e.g., Brown* v. *Comm'r,* 143 F. 2d 468, 470 (5th Cir. 1944); *Ehrman* v. *Comm'r,* 120 F. 2d 607, 610 (9th Cir. 1941). The fact that plaintiffs also practiced law and had income from investments and other sources does not disturb the character of their real estate activity as a separate business, nor does it affect the tax treatment to be given that separate business.

Plaintiffs argue that there are several activities generally associated with the holding of real estate for sale and that the absence of a finding of these activities in the instant case should operate to negate the conclusion that there was a holding for sale. These activities include soliciting and advertising for sale, and the development, subdivision, and/or extensive improvement of the property.

Appendix A

In support of this argument plaintiffs cite *Miller* v. *United States,* 168 Ct. Cl. 498, 339 F. 2d 661 (1964); *Scheuber* v. *Comm'r,* 371 F. 2d 996 (7th Cir. 1967); *Victory Housing No. 2, Inc.* v. *Comm'r,* 205 F. 2d 371 (10th Cir. 1953). It is true that these activities are factors often considered by the courts in determining whether property is being held for investment or sale, and the cited cases so indicate. However, a careful reading of these cases makes it equally clear that these activities are, as *Miller* pointed out, merely "helpful" factors to aid in the court's deliberation, and, as the *Victory* opinion cautioned, "none of them are determinative. Neither is the presence nor absence of any of these factors conclusive." 205 F. 2d at 372. Clearly, there is no one formula for determining whether property is held for sale or investment. Each case presents its own unique set of facts, all of which must be considered, and the absence of no one factor or set of factors is necessarily dispositive.

Also, it has been found that plaintiffs' contention that the circumstances surrounding each sale indicate that the properties were held only for rental income purposes is uncorroborated by the testimony of other co-owners and is contrary to the weight of the evidence.[3]

The best that can be said for plaintiffs' contention is that there are some facts in the record consistent with both a purpose to buy rental real estate and to sell it at a profit. But, this does not help plaintiffs. It is possible to be both in the business of renting and selling the same kind of property and to be taxed at ordinary income rates. "* * * if the entrepreneur holds out his wares either for sale or for rental, the taxation of his business gain from sales does

[3] Plaintiffs observe in their reply brief that their co-venturers were often their legal clients and in oral argument said it would embarrass plaintiffs to call them as witnesses because of the lawyer-client relationship. Plaintiffs say the defendant could have called them. But, plaintiffs had the burden of proof. *Crosswhite* v. *United States, supra.*

not depend upon a comparison of sales to rentals in the particular year." *Recordak Corp.* v. *United States*, 163 Ct. Cl. 294, 300, 325 F. 2d 460, 463 (1963). A dual or multiple purpose in buying real estate has not been outlawed nor do these other purposes mean that the property was not held, developed, and disposed of primarily in the ordinary course of trade or business. *Bauschard* v. *Commissioner, supra.* One must look to all the facts to find the primary purpose from which the tax consequences flow.

In plaintiffs' motion for leave to present further evidence, plaintiffs relied on *Municipal Bond Corp.* v. *Commissioner*, 341 F. 2d 683 (8th Cir. 1965), and the decision of the Tax Court on remand of that case in 46 T. C. 219 (1966), and say that under these authorities it is necessary for the trier of the facts, in applying the statutory test, to make specific findings of fact and conclusions of law with respect to each of the separate properties disposed of by taxpayers. Requested findings were not submitted upon this basis. What happened in *Municipal Bond Corp.* is that the Court of Appeals, noting that the court below had used an erroneous interpretation of the word "primarily," was uncertain as to whether, at least with respect to some of the properties; the lower court's decision might have been based on wrongful interpretation of that word. So, the Court of Appeals directed the lower court to make findings with respect to each individual property sold and to consider the purpose for which it was acquired, the purpose for which it was held, the motive at the time of sale, and the method of sale. The Court of Appeals also observed that the operations of petitioner's other corporations would have no probative force in establishing its purpose for holding the real estate, except to the extent that it might be shown that the other corporations were acting as its agents.

The circumstances in *Municipal Bond Corp.* do not exist here. The Court of Claims has not misinterpreted the

word "primarily" in the several cases it has decided where the statute with this word of art appears. This is not to say that in finding the facts the individual properties are ignored. *Tibbals* v. *United States,* 176 Ct. Cl. 196, 362 F. 2d 266 (1966). On the contrary, as in the instant case, each is identified and all relevant factors have been considered with regard to each, including the purposes for which the land was acquired, the motive for selling, the method employed in selling, the income from the sales as compared with taxpayers' other income, the extent of improvements made to facilitate sales, the frequency and continuity of sales, and the time and effort expended by taxpayer in promoting sales. No one factor standing alone is conclusive, but rather all are taken into consideration. *Bauschard* v. *Commissioner, supra; Crosswhite* v. *United States, supra.* It is noted, also, that property initially purchased as an investment can later change from a capital asset to that which comes within the ambit of section 1221(1) of the Internal Revenue Code. *Thompson* v. *Commissioner,* 322 F. 2d 122, 127-28 (5th Cir. 1963). The reverse is also true. *Tibbals* v. *United States, supra.*

It is not necessary to make separate findings and conclusions on each separate tract where the circumstances of each have been considered and the number of properties and sales thereof is great and frequent. The normal course of taxpayers' business is not established by an individual transaction. It is the overall, factual situation that must govern a particular case. As was said in *Nadalin* v. *United States,* 176 Ct. Cl. 1032, 364 F. 2d 431 (1966):

> • • • The isolation of and emphasis upon certain individual factors which constitute only threads in a complex situation should be guarded against, for it is the "total background of the transactions" and "the entire factual pattern of the case" that must govern.

Plaintiffs have not sustained their burden of proving as a fact that their real estate transactions in 1953, 1954, and 1955, which are in issue here, fell outside the broad scope of property held "primarily for sale to customers in the ordinary course" of their trade or business.

Skelton, *Judge,* *dissenting:*

I feel that I must dissent from the opinion of the majority because I cannot agree with the result it reaches.

The majority opinion correctly states the law that in a case of this kind the statutory test and issue is whether the property sold by the plaintiffs was held "primarily for sale to customers in the ordinary course of * * * [their] trade or business." If so, the profits were taxable as ordinary income, but if not they were taxable as long term capital gains. The problem is one of fact to be decided on the circumstances of the particular case. *Browne* v. *United States,* 174 Ct. Cl. 523, 356 F. 2d 546 (1966), and no one fact or circumstance is controlling. *Bauschard* v. *Commissioner,* 279 F. 2d 115 (6th Cir. 1960). The word "primarily" as used in Section 1221(1) of the Internal Revenue Code of 1954 means "of first importance" or "principally." It does not mean that a purpose may be "primary" if it is a "substantial" one. Individuals may have more than one business at a time and each business will be taxed accordingly and separately. There is no one formula for determining whether property is held for sale or investment. All of the facts and circumstances in a given case must be looked to in order to determine how the profits from sales are to be taxed.

I do not quarrel with these principles of law which the majority says should control this case. I disagree with the application of these rules by the majority to the facts of the case.

The commissioner found that the plaintiffs were not licensed real estate brokers and did not hold themselves out

by advertisement or otherwise as such. They were licensed attorneys at law and were engaged in the practice of law. They were invited from time to time by their clients to make investments in realty partnerships, corporations, and mortgages. Their investments in these ventures ranged from 2 to 50 per cent, but were usually 15 to 25 per cent. During the 3 years in question, the plaintiffs liquidated 17 of these investments which they had held for more than 6 months by selling them. This averaged less than 6 per year. The plaintiffs never had title to any of the real properties or mortgages in their own names. They took part in only 3 to 5 per cent of the real estate transactions in which they acted as lawyers. Their clients were the sponsors of the investments and invited plaintiffs to participate. Rent was collected on some of the properties from time to time. The plaintiffs say the profits on these investments should be taxed as long term capital gains.

The majority has unfortunately allowed two factors to control the decision against the plaintiffs, both of which, in my opinion were erroneously applied. First, they say that the income from the sale of the interests in the partnerships, corporations, and mortgages during the three years in question (1953, 1954, and 1955) was ordinary income because the sales were frequent. I do not consider that the 5 to 6 sales per year during these three years could reasonably be said to be excessive in number as to be "frequent" within the prohibited zone of the Internal Revenue Service so as to subject the profit therefrom to the ordinary income tax. Any successful businessman could reasonably be expected to dispose of at least a half dozen investments in the period of one year. The cases cited by Judge Nichols in his dissenting opinion, namely, *Dunlop* v. *Oldham Lumber Co.*, 178 F. 2d 781, 784-85 (5th Cir. 1950); *Lazarus* v. *United States*, 145 Ct. Cl. 541, 549, 172 F. Supp. 421, 426 (1959); *Abe Pickus*, 22 TCM 1791, 1796 (1963), support the proposition that the few sales per year involved here are not "frequent or great."

In the second place, the total earnings of the plaintiffs from all sources have been thrown together as one ball of wax and then the earnings from the practice of law have been set off against plaintiffs' other earnings to show that the "other earnings" are greater than those from their law practice. Not only has this been done, but the majority has used income figures from years not involved here which increases the averages against the plaintiffs and presents a lopsided picture against them which is not supported by the figures for the three years in question. Furthermore, the majority has added ordinary income other than that from the law practice to the income from the sale of realty interests, not only for the 3 years in question, but for the period 1950-1956 (and for some purposes 1950-1958), and then compares the total with the income from law practice on an average basis over the whole period. This emphasizes that the income of plaintiffs from their law practice was far less than that from other ordinary income sources and from sales of realty interests when added together. For instance, in finding 29, the commissioner shows the total income from the law practice from 1950 through 1956 in one column, and the total income for this period as ordinary income from other sources in the second column, and income from the sale of real estate is shown in the third column. The majority uses these figures to hold that during this seven-year period (1950-1956) the average annual income of plaintiffs from the sale of realty interests was $48,261.33 (and in one year 1950 (not involved here) was $91,000); their annual average ordinary income from sources other than the practice of law was $44,919.39; and their average annual income from the practice of law was $35,001.12. The majority then sets off the total of the averages of the sales of real estate ($48,261.33), plus that of the ordinary income other than the practice of law ($44,919.39) against the total average income from the practice of law ($35,001.12). This is

wrong for at least two reasons. In the first place, only 1953-1956, inclusive, should be considered and not the period of 1950-1956, inclusive, since only 1953, 1954, and 1955 are involved. In the second place, the income from the law practice should be added to the other ordinary income (on all of which plaintiffs paid ordinary income taxes) and this should be considered as against the income from the liquidation of realty investments for the three years involved. If this is done, the facts will show that the plaintiffs had an average annual income during 1953-1955 from the practice of law and from other ordinary income sources of $64,922.40, and an average annual income during the same period from the sale of real estate investments of $40,257.12. This is the fairest way to calculate plaintiffs' income. It shows that their income from the disposal of realty investments was less than ⅔ of their ordinary income. This is not enough to subject their income from the liquidation of their real estate investments during these 3 years to the ordinary income tax.

The Congress has not said that 6 sales of investments of real estate in one year means that the property was held "primarily for sale in the ordinary course of business" by the seller. Nor has it indicated that 5 or 4 or even 3 are all that the law allows in order for the taxpayer to enjoy the benefit of the capital gains tax. If the present policy of the Internal Revenue Service in this field is allowed to continue and certainly if it is expanded, all investments will be prohibited. There is nothing wrong with making a profit on an investment. In fact, investments for profit have developed our country beyond all expectations. We should encourage them instead of prohibiting them.

The number of investments in a given year in one kind or several kinds of property should be immaterial, so long as they are really and truly investments. For instance, a man might make a dozen investments in real estate in a

year on which upon their liquidation after six months he would realize a total profit of $50,000. The I.R.S., according to the majority opinion, would be justified in saying he was a dealer and subject to a tax on all of his profit as ordinary income. Whereas, another investor could make one large investment during the same year which upon liquidation after six months nets him a profit of a million dollars or more. Even if this is much greater than his other income, he would be entitled to the benefit of the long term capital gains tax because he had only one sale during the year. This is discriminatory and unfair and was never intended.

It is clear that Congress intended that the term "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" would apply basically to goods on the shelf in a mercantile store or in a showroom daily exposed for sale, or in a similar situation. In real estate, it would apply to a dealer who subdivides property and sells lots, or at least has a list of properties which he holds out to the public as being for sale in the ordinary course of his real estate business. This is not the case here.

While it is true that the commissioner and the majority say that all relevant factors have been considered with reference to each realty investment, they hold that it is not necessary to make separate findings and conclusions on each separate tract "where the circumstances of each have been considered and the number of properties and sales thereof is great and frequent."

The commissioner listed in finding 28 twelve factors, among others, which motivated plaintiffs in their disposal of realty interests in addition to or concurrent with a desire to make money or avoid losing money. After listing these factors, the commissioner stated in such finding:

> It is not possible from the evidence to determine how many of plaintiffs' transactions were influenced by the

foregoing considerations to the complete exclusion of sales for profit. Both profits and losses were occasioned where some of the foregoing factors were present but gains far exceeded losses over all.

However, the commissioner on the remand excluded the above quoted portion of finding 28. This indicates that although the commissioner at first believed, and inferentially found some of the transactions were influenced by the twelve listed factors "to the complete exclusion of sales for profit," he did not finally consider them nor make any separate findings with reference to them. This omission supports my conclusion that at least some, if not all, of the sales should be accorded capital gains treatment.

It is obvious that the two factors which controlled the decisions of the commissioner and the majority were the alleged frequency of sales of investments and the comparison of the income of the taxpayers from the practice of law with their income from other sources. These factors, considered separately or together, should not be dispositive of this case against the taxpayers for all of the reasons stated above.

I would enter judgment for the plaintiffs for the recovery of the taxes sued for, plus interest.

Nichols, *Judge*, *dissenting:*

I respectfully dissent from the opinion of the majority.

The record reflects that the taxpayers, real estate lawyers, invested in various real properties as minority members of syndicates. They did not manage the properties. They did not, and their syndicates did not, develop, subdivide, or otherwise change the condition of the properties. They did not sell off large parcels in small lots at retail as a subdivider does. So far as appears the buyers were other investors like plaintiffs, purchasing entire buildings or comparable properties, substantially in the condition plaintiffs' syndicates had bought them, depreciа-

tion excepted. These transactions, if infrequent, would concededly be classic instances of capital investment. By some magic mere frequency is held to strip them of that character.

The court has concluded that:

> It is not necessary to make separate findings and conclusions on each separate tract where the circumstances of each have been considered *and the number of properties and sales thereof is great and frequent.* The normal course of taxpayers' business is not established by an individual transaction. It is the overall, factual situation that must govern a particular case. (Emphasis supplied.)

The taxpayers objected to this conclusion, and argued that even if sales were great and frequent, a taxpayer's purpose in holding real property must be determined separately as to each tract he holds, citing *Tibbals* v. *United States, supra; Municipal Bond Corp.* v. *Commissioner, supra; Murray* v. *Commissioner,* 370 F. 2d 568 (4th Cir. 1967), aff'g. per curiam 24 TCM 762 (1965); and *Stanley H. Klarkowski,* 24 TCM 1827 (1965), aff'd. (7th Cir.) 67-2 USTC ¶ 9649 (1967). On the facts of this case I agree.

In the past this court has held the factor of frequency and continuity of sales not to be a conclusive test. *Oahu Sugar Company* v. *United States,* 156 Ct. Cl. 546, 555, 300 F. 2d 773, 778 (1962). Yet, great stress has been put on such factor in this case, as is evidenced by the fact that it is the only one of the numerous factors usually looked to in a case of this type that is specifically mentioned in the above quoted conclusion. It is with this conclusion, and the ramifications therefrom, that I take exception.

The gains in issue in the case at bar stem from the sale or disposal of real properties which were held for 6 months or more. The total number of separate gains being looked to is 20, or, over the 3 year period in issue, an average of

somewhat less than 7 a year. The court has characterized this average number of sales as being "great and frequent." I cannot agree.

In *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263, 266 (9th Cir. 1951), an average of 400 sales a year for 2 years was held to be frequent; in *Ehrman* v. *Commissioner, supra*, an average of 153 sales a year for 2 years was held to be frequent; and in *Brown* v. *Commissioner, supra*, an average of 26 sales a year for 3 years was held to be frequent. However, in *Dunlap* v. *Oldham Lumber Co.*, 178 F. 2d 781, 784-85 (5th Cir. 1950), an average of 17 sales a year for 2 years was held to be infrequent; in *Lazarus* v. *United States*, 145 Ct. Cl. 541, 549, 172 F. Supp. 421, 426 (1959), this court said that an average of 23 sales a year for 4 years was "not particularly frequent;" and in *Abe Pickus*, 22 TCM 1791, 1796 (1963), an average of 6.4 sales a year for 10 years was held to be infrequent. Thus, I cannot see how, in the case at bar, the taxpayers' average sales being looked to for the years in issue of somewhat less than 7 a year can properly be characterized as "great and frequent." The same would hold true for all sales made during the years in issue, those averaging 17 a year. Without its finding of "great and frequent" sales, all the court is saying is that separate findings need not be made where the circumstances underlying the holding of each tract have been considered. If this were the typical subdivision case I would agree. However, it is not.

Of the cases relied upon in the commissioner's opinion, as modified and adopted by the court, I do not take issue with those indicating that no one factor is determinative of the purpose for which property is held. However, the court, in reaching its decision, has refused to apply the test, evolving from *Municipal Bond Corp., supra*, of viewing each property separately in order to make specific findings of fact as to each because "The circumstances in

Municipal Bond Corp., do not exist here," that is, this court has not, as did the lower court in *Municipal Bond Corp.*, misinterpret the word "primarily" as used in the statute.

In finding against the taxpayers, the court has relied mainly, indeed almost wholly, on cases involving subdivisions made by the taxpayer. Such a subdivider is essentially a retailer, and the lots he sells normally are just as much stock in trade as the inventory of a supermarket. Even so, some subdividers have obtained capital gains treatment for their sales by persuading the courts, through the infrequency of their transactions, that they were not actually in the business of retailing land. Thus courts have got in the habit of applying a frequency test, and here now it has been used in an instance of pure investment where it is grotesquely misapplied. The *Municipal Bond Corp.*, case did not involve a subdivision and that was why it was held necessary to view each property separately, as we should have done here. (However, the Tax Court even in a subdivision case has held that a "separate look" at each tract is necessary, *e.g., Stanley H. Klarkowski, supra.*) It is this distinction that I deem significant, now that the definition of "primarily" has been authoritatively settled, see *Malat* v. *Riddell, supra,* and it is the circumstance that does exist in both *Municipal Bond Corp.*, and the case at bar.

This point is not a personal invention of mine. In *Frieda E. J. Farley,* 7 T.C. 198 (1946), acq. 1946-2 C.B. 2, the Tax Court said (at p. 202):

> • • • It is unquestionably true that the frequency and continuity with which a particular activity is carried on is a primary consideration in determining whether such activity constitutes a trade or business. It is significant to note however, that the cases which have applied this test to real estate transactions involved elements of development and substantial sales activity which are essentially lacking in this case. • • •

Appendix A

It will be noted that the statutory language relied on by our commissioner, in the opinion we adopt per curiam, is that of I.R.C. of 1939, Sec. 117, which excludes from capital gains treatment:

> • • • property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business • • •

The intent of Congress must be our lodestar, and in determining that intent it is always helpful to consider what Congress actually said. The majority considers the meaning of the word "primarily", but they pass the word "customers" over in silence. I presume some sales are other than to customers, else the word is surplusage. In my semantics, the word fits the buyers of subdivision lots perfectly and the purchasers here involved not at all. However, we may assume arguendo that if a person is in a "trade or business" the persons he sells to in the ordinary course of his business are "customers." See *Charles H. Black,* 45 B.T.A., 204, 210 (1941), acq. 1941-2 C.B. 2. Whether mere passive investment in property in the hope it will appreciate in value is in this context a "trade or business" if extensively engaged in is, alas, something else I am not clear about. If it is, it seems to me we confront the logical absurdity that a systematically pursued intent to realize capital gains deprives one of capital gains treatment. It denies the usual rule that a person may purposely arrange his transactions, as long as they have a business purpose or other substantial economic reality, in the manner that incurs the lowest tax. *Gregory* v. *Helvering,* 293 U.S. 465 (1935). To obtain capital gains treatment, one must make a great show of having been thinking of something else. Taxpayers here took their assigned role, attempting unsuccessfully to persuade our commissioner that they contemplated only rental income and that the realization of gains on resale came as a complete surprise to them.

Appendix A

This branch of the income tax laws, as interpreted, should be of great interest to those whom H. L. Mencken used to call "connoisseurs of the preposterous." I await future developments with interest and anticipation.

I would hold that in a non-subdivision case each specific tract of realty must be looked at separately, with specific findings of fact made as to each tract, to determine the nature of the gain resulting from the sale or other disposition thereof, with the test of frequency of sales, when applied to the whole, not being given the controlling emphasis it has received today.

FINDINGS OF FACT

1. Plaintiffs David B. Goodman and Theresa L. Goodman are residents of New York State and are both citizens of the United States and at all times relevant herein were husband and wife. Theresa L. Goodman is a plaintiff solely as the result of filing joint federal income tax returns for the years 1953, 1954 and 1955 with her husband and is not otherwise connected with the transactions here in issue.

2. Herbert S. Goodman, prior to his decease on April 9, 1956, was, and plaintiff Gladys C. Goodman is a citizen of the United States and until April 9, 1956, they were husband and wife.

3. Gladys C. Goodman (now known as Gladys C. Dubin as the result of her marriage on October 12, 1958, to Herman D. Dubin) is the duly appointed and acting executrix of the estate of Herbert S. Goodman and is a resident of New York State. She is a plaintiff as the result of filing joint federal income tax returns for the years 1953, 1954 and 1955 with Herbert S. Goodman and as the executrix of his estate but is not otherwise connected with the transactions here in issue.

4. Plaintiff Harry Mabel is, and Florence Mabel was, prior to her decease on December 27, 1955, a citizen of the United States and at all times relevant until her death they were husband and wife.

5. Harry Mabel is the duly appointed and acting executor of the estate of Florence Mabel. He is a resident of New York State. The estate of Florence Mabel is a plaintiff as the result of joint federal income tax returns filed for the years 1953, 1954 and 1955 by Harry and Florence Mabel but neither Florence nor her estate was otherwise connected with the transactions in issue in this case.

6. Plaintiffs' claims are for recovery of federal income tax and interest thereon assessed against and paid by them for the calendar years 1953, 1954 and 1955 to the District Director of Internal Revenue, Manhattan, New York. Pursuant to the rules of the court, the parties stipulated, with the approval of the Commissioner, that the trial of this case should be limited to the issues of law and fact relating to the rights of the respective plaintiffs to recover, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings.

7. David Goodman was admitted to the practice of law in the State of New York in 1921, Harry Mabel in 1920 and Herbert Goodman in 1929. From 1929 and through the relevant years of 1953, 1954 and 1955, they were members of the bar of that state and practiced together as partners under the firm name of Goodman and Mabel with offices in New York City.

8. The law firm of Goodman and Mabel specialized in the practice of real estate law. David Goodman's practice was limited to the practice of such law. The other members of the firm handled other and related legal matters.

9. Among other legal matters handled by plaintiffs through their law firm was the representation of clients who bought and sold real estate and placed mortgages on real estate. Some of these clients invited the plaintiffs to participate with them in certain such real estate ventures and it was their practice to do so since the middle 1930's. The clients who invited plaintiffs' participation were aware of their continuing interest in purchasing real property.

10. David B. and Herbert S. Goodman and Harry Mabel were never licensed real estate brokers nor advertised nor acted as such. Plaintiffs neither individually nor as Goodman and Mabel ever advertised for opportunities to buy or sell interests in real estate. Their opportunities in real estate arose through contact with clients who were investors and speculators in real estate. Plaintiffs took part in only 3 to 5 percent of the real estate transactions in which they acted as lawyers. At all times they reserved their own judgment as to whether they would participate in opportunities offered by their clients.

11. Groups with which plaintiffs bought interests in real estate were usually composed of four to six persons. However, a few of the groups were large, containing as many as 10 to 25 participants, one group including 95. The participants in the various groups were often different persons but the clients who invited plaintiffs' participation were often the same. There were some people who would not buy an interest in a real estate venture unless plaintiffs participated for they had confidence in their judgment in such matters.

12. Prior to participating in any real estate venture, plaintiffs would go over the information furnished thereon by the broker, such as rental income and expenses. They would verify the figures, discuss the merits of the deal

and one or more of the partners would often examine the property. Often, if the property was located outside the city of New York, plaintiffs relied upon the ability of their clients in evaluating it and sometimes relied upon the known responsibility of the tenant.

13. Plaintiffs always participated in real estate ventures together. Each proposed transaction was discussed among the members of the law partnership prior to participation therein, and they did not participate unless all three agreed it was wise to do so. David Goodman, because of his special background and experience in real estate, usually took the lead in identifying for his partners prospective ventures for their consideration.

14. David Goodman devoted as much of his time as he felt required by the real estate interests of Goodman and Mabel, whether during the week, on evenings or on weekends. The work included keeping track of the moneys received by Goodman and Mabel as its return from its interests in real estate ventures. This cash flow, representing income generated by properties and return of capital, was substantial. Cash receipts amounted to $220,730.61 in 1953, $191,183.35 in 1954, and $245,897.25 in 1955. David Goodman also made disbursements as required for a few projects in which the partnership acted as agent for a venture, as noted in finding 21. Harry Mabel and Herbert Goodman's time was devoted largely to the practice of law except for the time required for consultation and study concerning the advisability of purchases or sales of real estate interests or participation in ventures with others involving the same as heretofore noted.

15. When plaintiffs purchased an interest in real estate they held it either in partnership or corporate form. When held as a partnership, title would be taken in two or three

names as tenants-in-common. The law partnership was represented by one of the plaintiffs who issued a letter to his two partners in which he stated that he held title for their benefit. Plaintiffs' ownership interest in each venture varied from 2 to 50 percent. Normally their partnership interest ranged between 15 and 25 percent.

16. The individual who inaugurated the purchase of the property usually negotiated its sale or chose a broker to do so. The proposed price was always discussed with the entire group before an appointment was made to close the contract. When a piece of property was finally sold, it was the unanimous opinion of all the venturers that the price received was the best one available, and that the sale should be made. Plaintiffs never vetoed or refused to consent to a sale when the other participants desired to dispose of the property.

17. During the years 1953, 1954 and 1955 the law firm of Goodman and Mabel continued the practice commenced by them in the 1930's of buying, holding and selling interests in real estate either through partnerships owning real property as tenants-in-common, through ownership of stock in corporations owning real property or through mortgages on realty. Most of the properties in which plaintiffs owned an interest were located in the metropolitan area of New York City but a substantial number were scattered throughout the entire country.

18. The law firm of Goodman and Mabel sold or otherwise disposed of certain of its interests in real estate during the years 1953, 1954 and 1955 and, as a result, realized gains and losses reportable for federal income tax purposes. Goodman and Mabel reported income on the calendar-year basis and used the cash receipts method of accounting. The firm filed form 1065—United States Partnership Returns of Income—for the years in issue and

reported the gains and losses resulting from the sale or disposal of its interests in real properties as gains or losses on the sale or disposal of capital assets. The real properties, the sale or disposal of which gives rise to the gains on which tax is here in issue, were held by partnerships in which the law firm of Goodman and Mabel had owned an interest for 6 months or more.

19. The extent of plaintiffs' transactions during the years 1953, 1954 and 1955 is set forth below in tabular form showing location of the property, date of acquisition, percentage of total ownership, date of sale or other disposition and the resulting gain or loss on all realty property interests sold or disposed of during the 3-year period here in issue, whether held for more or less than 6 months:

1953

Partnerships—Properties held more than 6 months

Location of property	Date acquired	Date sold or disposed of	Plaintiffs' interest	Gain	Loss
			Percent		
637-49 West 133d St., N.Y.	6/4/46	9/30/53	25	$225.18	
Easthampton Lots, Long Island, N.Y.	7/14/50	5/31/53	16⅔	757.57	
Muskogee, Oklahoma-Broadway Syndicate	8/8/50	6/30/53	20	3,904.14	
Additional allowance not reflected per return, increasing basis in Broadway Syndicate, per prior examining agents, 1951 report					$11,343.62
Staley Building (sale of equipment)				2,708.51	
204th Street & Nagel Ave., N.Y.	10/11/51	2/6/53	50		6,039.39
91st Street & 92d St., N.Y.	10/2/52	11/12/53	50		190.16
1209 Bushwick Avenue, N.Y.	5/24/38	1/1/53	25	12,610.24	
Hollywood, Calif.	2/12/53	9/6/53	25	2,200.35	
				22,405.99	17,573.17
				—17,573.17	
1953 Gain on which tax is in issue				4,832.82	

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1953

Partnerships—Properties held 6 months or less

Location of property	Date acquired	Date sold or disposed of	Plaintiffs' interest	Gain	Loss
			Percent		
1267 Lexington Ave., N.Y.	12/10/52	2/16/53	25	$841.87	
315-317 East 187th St., N.Y.	3/15/53	3/16/53	25	2,639.11	
Shatto Pl., Calif.	3/14/53	6/16/53	25	1,625.00	
309-311 3d Ave., N.Y.	5/27/53	7/1/53	25	1,598.35	
1152 2nd Ave., N.Y.	7/16/53	10/19/53	25		$150.00
33 East 27th St., N.Y.	2/24/53	5/5/53	25	2,361.25	
125 West 72nd St., N.Y.	10/12/53	12/31/53	25		900.00
207 West 38th St., N.Y.	4/1/53	6/30/53	25		750.00
112 West 17th St., N.Y.	5/6/53	6/16/53	25		250.00
525 West 25th St., N.Y.	5/25/53	6/25/53			750.00
Staley Building (sale of equipment)				1,030.52	
				10,096.10	2,800.00
				—2,800.00	
				7,296.10	

1953

Real Estate Corporations

Name	Location of property	Date acquired	Date sold or disposed of	Gain
Mercer Syndicate	Buffalo, N.Y.	4/10/51	6/30/53	$123.57
Upland Nitner, Inc.	Grand Concourse, Bronx, N.Y.	4/14/53	6/21/53	1,902.78

1954

Partnerships—Properties held more than 6 months

Location of property	Date acquired	Date sold or disposed of	Plaintiffs' interest	Gain	Loss
			Percent		
1011 Freeman St. (Fiscal Year), N.Y.	11/27/40	8/4/53	25	$21,212.88	
1011 Freeman St. (Mortgage Installment), N.Y.	2/1/40	6/30/53		1,050.82	
St. Augustine, Fla.	9/20/50	1/26/54	15	3,375.64	
1209 Bushwick Ave. (Final Distribution), N.Y.	5/24/38	1/1/53	25	171.55	
Additional allowance not reflected per return, increasing basis in Tropical Realty, per prior examining agents' 1951 report					$828.60
				25,810.89	828.60
				—828.60	
1954 Gain on which tax is in issue				24,982.29	

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1954

Partnerships—Properties held 6 months or less

Location of property	Date acquired	Date sold or disposed of	Plaintiffs' interest	Gain	Loss
			Percent		
71-79 West 45th St., N.Y.	1/18/54	4/15/54	25	.....	$1,999.33
5866 South Vermont Ave., Los Angeles, Calif.	5/5/54	7/9/54	.....	$2,653.24	
525 West 25th St., N.Y.	5/25/53	2/1/54	25	*225.00	
				2,878.24	1,999.33
				—1,999.33	
				878.91	

* Recovery on $750.00 loss incurred in 1953.

1955

Partnerships—Properties held more than 6 months

Location of property	Date acquired	Date sold or disposed of	Plaintiffs' interest	Gain	Loss
			Percent		
2109 Borden Avenue (Fiscal Year), N.Y.	4/8/47	10/1/54	16⅔	$6,715.12	
Sherman, Tex.	3/9/49	11/7/55	25	5,997.61	
672 East 136th Street (Fiscal Year), N.Y.	3/2/53	6/29/54	33⅓	4,960.19	
1419 Shakespeare Ave., N.Y.	1/4/54	9/21/55	25	3,867.52	
71-79 West 45th St., N.Y. (Fiscal Year)	1/18/54	11/8/54	25	27,235.53	
82nd Ave., Jackson Hts., N.Y.	9/16/54	4/30/55	15	7,104.20	
529 West 35th St., N.Y.	7/20/54	3/2/55	25	10,271.96	
22-24 West 13th St., N.Y.	11/8/54	12/12/55	25	.....	$2,821.00
1011 Freeman St., N.Y. (Mortgage Installment)	2/1/40	6/30/53	.....	1,104.64	
				$67,256.77	$2,821.00
				—2,821.00	
1955 Gain on which tax is in issue	.....	.....	.....	$64,435.77	

1955

Partnerships—Properties held 6 months or less

Location of property	Date acquired	Date sold or disposed of	Plaintiffs' interest	Gain	Loss
			Percent		
67 Perry St., N.Y.	.....	.....	40	$250.00	
Merrick Ave., East Meadow, Long Island, N.Y.	.....	.....	15	1,690.41	
				1,940.41	

20. The sponsor of the ventures in which plaintiffs participated was usually their client. He was responsible for management of the property although sometimes he selected a managing agent to collect rents, maintain the property and keep it occupied. The sponsor would receive reports from the agent on behalf of the participating owners to whom he was accountable. The sponsor maintained an account in which he deposited the rents and from which he made all required payments for such things as interest, taxes, management fees, water bills, repairs, maintenance and other expenses. All expenses were borne by each venturer in his pro rata share in accordance with his percentage of the ownership.

21. In some instances, the plaintiffs' law partnership acted as agent of the venture for collection of rents and disbursement of expenses. Rent and other income received from the property was deposited in a Goodman and Mabel "agency" account from which mortgage, tax and water, and other payments were made, including a pro rata share of rental income to the joint venturers in the property. The number of times the partnership so acted varied from as many as 15 in 1950 to as few as 7 in 1956 and 1957. The partnership received no fees for this service. A special checkbook was kept for the agency account.

22. Proceeds received by the partnership from the sale of its interests in real estate were held in a "real estate" account for the purpose of purchasing new real estate properties. The partnership also maintained a "regular" bank account to segregate plaintiffs' real estate assets from law partnership assets. It also had a "special" account for funds entrusted to the law partnership in escrow.

23. Clients and co-owners with plaintiffs in real estate were not only sponsors for such ventures but sometimes held real estate brokers' licenses. During the years 1953,

1954 and 1955 these individuals included the following:

Murray Adler	Albert Klein
A. B. and B. B. Block	David Lieberman
Joseph Cinich	Irving Pepper
Maurice Greenstein	Louis Silverman
Reuben Horowitz	Charles Walzer

24. Plaintiffs rendered legal services for the real estate ventures in which they participated and received fees therefor when another of the members of the venture received a finder's fee, a brokerage fee or a commission for management. Brokerage fees were based on a percentage of selling price and exceeded legal fees paid.

25. During the period 1950-1958 plaintiffs owned stock in 4 to 11 realty corporations. They held from 35 to 57 different interests in realty partnerships and from 6 to 21 realty mortgages. In some cases the mortgages were acquired by plaintiffs upon the sale of their real estate interests when a purchase money mortgage was taken in part payment of the sales price. As of the first of each year the plaintiffs held the following number of interests in real estate:

	1950	1951	1952	1953	1954	1955	1956	1957	1958
Realty partnerships	56	50	49	35	39	48	49	56	57
Realty corporations	8	11	7	8	4	6	6	6	4
Real estate mortgages	6	16	17	18	19	18	13	17	21

26. The adjusted cost basis of the plaintiffs' total ownership of real property interests between 1950 and 1958 exceeded $397,000. The adjusted cost basis for these years as of January 1, for each type of ownership and their total basis in all real property held for that year, was as follows:

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	Realty partnerships	Realty corporation	Realty mortgage	Total
1950	$276,423.09	$46,307.79	$90,157.42	$397,606.63
1951	265,008.61	78,242.87	107,450.18	450,701.66
1952	256,279.53	60,926.93	117,259.47	434,465.93
1953	218,942.61	77,695.87	130,842.80	427,481.28
1954	297,044.98	46,818.32	142,313.55	486,176.85
1955	282,239.21	72,805.83	177,195.49	532,240.53
1956	284,631.86	36,435.14	149,383.01	470,450.01
1957	366,349.93	31,061.45	116,171.11	513,582.49
1958	379,057.72	17,818.16	139,871.20	536,747.08

The fair market value of the foregoing interests in real estate was far in excess of the above-stated adjusted cost basis.

27. Plaintiffs' activity in purchasing and disposing of real estate interests during the period 1950 through 1958 is further shown by the following table of transactions:

	Realty purchased	Partnerships disposed of	Realty corporation		Realty mortgages		Total transactions
			Purchased	Disposed	Purchased	Disposed	
1950	10	16	5	2	11	1	45
1951	11	17	3	2	10	9	52
1952	6	11	3	2	9	8	39
1953	19	17	.....	2	7	6	51
1954	13	7	3	.....	4	5	32
1955	12	7	.....	.....	1	6	26
1956	14	6	1	1	6	2	30
1957	6	5	.....	2	10	6	23
1958	5	5	.....	.....	5	8	26

28. The volume of plaintiffs' activities in the real estate market was such that their disposal of realty interests was motivated by a wide variety of factors to be expected in addition to or concurrent with a desire to make money or to avoid losing money. Some of these factors were as follows:

(a) Neighborhood deterioration.

(b) Need for extensive repairs.

(c) Death of a co-owner.

(d) Inability of co-owners to get along.

(e) Property could not be developed for purpose for which acquired.

(f) Building not well located for commercial purposes.

(g) Problems with tenants.

(h) Refinancing difficulties.

(i) Misrepresentation by seller as to income and expenses.

(j) Poor rental income.

(k) Inability to obtain finances necessary to close contract and obtain title.

(l) Zoning difficulties.

29. During the period relevant herein the firm of Goodman and Mabel received the following net taxable income from the following sources:

	Net income from practice of law	Net ordinary income from other sources[1]	Net income from the sale or disposal of interest in real estate
1950	$38,256.43	$75,943.62	$91,392.53
1951	47,324.87	50,008.95	68,154.41
1952	25,498.58	47,987.84	26,647.05
1953	40,296.46	44,035.18	29,300.89
1954	21,266.10	46,728.50	26,548.58
1955	30,722.05	11,718.93	64,921.91
1956	41,643.34	38,012.69	30,863.93

[1](a) Interest on realty mortgages. (b) Dividends and salaries from realty corporation. (c) Income from realty partnerships.

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The total yearly net taxable gain for federal income tax purposes received by Goodman and Mabel from the sale or disposal of interests in realty corporations, partnerships and mortgages, for the years shown above, was substantially less for interests held 6 months or less than for such interests held more than 6 months.

30. A bank account entitled "Goodman and Mabel Investments" was established in 1956 after the death of Herbert Goodman. The purpose of this account was to differentiate all purchases of real estate made after his death from those properties in which his estate had an interest. The latter were described as Goodman and Mabel "realty holdings."

31. Herbert Goodman owned interests in real estate held outside the firm of Goodman and Mabel, some of which he received through his father. At the time of his death he held interests in over 40 parcels of real estate, including unimproved property, located in New York City and throughout the nation. Some of these properties had mortgages on them and in some he owned only fractional interests. The values of these properties, without allowance for any encumbrances thereon, ranged from $40,000 to approximately $7,000,000.

32. Plaintiffs filed timely joint income tax returns for the years 1953, 1954 and 1955 and paid the tax shown as due thereon. The law partnership of Goodman and Mabel filed timely federal partnership income tax returns for the same 3 years.

33. The Commissioner of Internal Revenue audited the returns for the years 1953, 1954 and 1955 and assessed deficiencies against each individual taxpayer. The resulting deficiencies were paid by plaintiffs who filed timely claims

for refund therefor. All of these claims were denied. The amounts of taxes paid, deficiencies assessed and refunds sought are stipulated by the parties and are not in dispute here.

34. The basis of the determination by the Commissioner was that the amounts reported as capital gains arising from the sale by Goodman and Mabel of certain interests in realty constituted ordinary income and that the distributive shares to plaintiffs of the net gains from the sales during the years 1953-1955 of interests in real properties owned and held for more than 6 months by the partnership was subject to tax as ordinary income, on the grounds that the firm of Goodman and Mabel was deemed to be a dealer in realty and said interests in real property were held primarily for sale to customers in the ordinary course of a trade or business.

35. No action on the claims for refund for the years 1953, 1954 and 1955 filed by David B. Goodman and Theresa L. Goodman, the estate of Herbert S. Goodman and Gladys C. Goodman (Dubin), or Harry Mabel and the estate of Florence Mabel has been taken by the Congress or any of the departments of the United States Government, other than as outlined above, or in any judicial proceeding other than the instant action which was timely filed.

ULTIMATE FINDING

36. For approximately 30 years, including the years 1953-1955, inclusive, plantiffs participated extensively in the purchase and sale of real estate. Because plaintiffs bought few tracts of vacant land they devoted little time and money to the purpose of making improvements thereon. Due to the manner in which they operated ventures through

client-sponsors (who were often realty brokers and with whom they were co-owners), plaintiffs personally were usually involved to a limited extent in managing or selling said properties, though such activities had their consent and approval. However, the weight of the credible evidence shows that they bought and held the subject property primarily for sale during the years in issue and during other relevant years. This is evidenced by the magnitude of their holdings, the extensive, frequent and continuous sales of the same, frequent short holding periods, the large amounts of money involved in these transactions, segregation of proceeds of sales for purchase of other real estate interests, and the profits derived from such ownership and sales as compared to plaintiffs' other income from the practice of law. Their testimony that their ventures in real estate were motivated primarily by interest in rental income and not in sales, is uncorroborated by the testimony of other co-owners and is contrary to the weight of the evidence. The evidence establishes, through the totality of their actual purchases and sales, that plaintiffs held the subject real estate primarily for sale in the ordinary course of their business.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and their petition is dismissed.

APPENDIX B

Report of Commissioner.

IN THE UNITED STATES COURT OF CLAIMS

No. 122—61

DAVID B. GOODMAN and THERESA L. GOODMAN; ESTATE OF HERBERT S. GOODMAN, Deceased, GLADYS C. GOODMAN, Executrix, and GLADYS C. GOODMAN, Surviving Wife; HARRY MABEL, Surviving Husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, Executor,

v.

THE UNITED STATES.

REPORT OF COMMISSIONER

(Filed Feb. 2, 1965)

To the Honorable, the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

[These Findings are printed in the Opinion—Appendix A—, pp. *supra*]

[Findings 1. to 27. as in Opinion]

28. [Same as Finding No. 28 (*supra*, p.), except that the following is, in this Report, the concluding para-

graph of this Finding:

"It is not possible from the evidence to determine how many of plaintiffs' transactions were influenced by the foregoing considerations to the complete exclusion of sales for profit. Both profits and losses were occasioned where some of the foregoing factors were present but gains far exceeded losses over-all."]

[Findings 29. to 35. as in Opinion]

36. [Same as Finding No. 36 (*supra*, p.), except that the following is, in this Report, the concluding phrase: "or as an adjunct of the regular business operations of the partners."]

MARION T. BENNETT,
Commissioner.

APPENDIX C

Supplemental Report and Opinion of Commissioner.

SUPPLEMENTAL REPORT OF COMMISSIONER TO THE COURT*

(Filed February 15, 1967)

Thomas N. Tarleau, attorney of record, for plaintiff. *Robert B. Hodes* and *Edwin H. Baker,* of counsel.

Knox Bemis, with whom was *Assistant Attorney General Mitchell Rogovin,* for defendant.

OPINION

BENNETT, *Chief Commissioner:* After oral argument on the findings of fact of the trial commissioner and the submission of supplemental briefs, the court, on May 16, 1966, acceded to plaintiffs' request that this case be remanded for reconsideration in light of the decision of the Supreme Court in *Malat* v. *Riddell,* 383 U. S. 569 (1966), which was announced after the commissioner's findings were filed. The order of remand authorized the commissioner "to the extent appropriate, to make new or additional findings in the light of that decision, with leave to the trial commissioner, if he deems it necessary or desirable, to allow the parties to present further evidence."

On December 1, 1966, the court entered a further order directing the commissioner to submit recommendations for conclusions of law. Thereafter, the commissioner directed the parties, within a time stated, to make such submissions

* The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

as they wished him to consider before he complied with the orders of the court. Plaintiff, on January 3, 1967, filed a motion for leave to present further evidence. Plaintiff subsequently requested and was granted oral argument on the motion. After hearing counsel and considering the motion and defendant's objections thereto, it was concluded that plaintiff had failed to show that the extensive record already made did not contain an adequate presentation of its case.[1] It was also concluded that plaintiff had no newly discovered evidence or evidence that could not have been presented at the trial already held, and the motion was denied by order entered January 31, 1967. This order also precluded the parties from making any further submissions to the commissioner on the grounds that all that could usefully be said had already been said, and undue delay would otherwise result. The considerations advanced by plaintiff in its motion and oral argument and in its briefs and exceptions to the court will be considered hereafter.

It is the considered judgment of the commissioner that his findings of fact are not inconsistent with *Malat* v. *Riddell, supra,* and that they are in accord therewith and with prior decisions of the Court of Claims. A single modification thereof is made as hereinafter described. The facts and the law clearly demonstrate, as indicated in the ultimate finding heretofore made, that plaintiffs held real estate primarily for sale in the ordinary course of business and are not entitled to capital gains treatment of their profits, which thus bars them from recovery in this suit.

There is little disagreement about the basic facts, many of which are stipulated. From 1929 through the relevant years of 1953, 1954, and 1955, David and Herbert Good-

[1] Plaintiffs' reply brief filed September 15, 1965, states: "The testimony during trial and taxpayers' briefs accompanying its requested findings of fact carefully, and in great detail, reviewed every sale of real estate made by taxpayers during the years in issue."

man and Harry Mabel were law partners practicing in New York City under the firm name of Goodman & Mabel. They specialized in real estate law. Such practice led to opportunities to buy and sell realty and to place mortgages on real estate for their own interests, as well as for clients and associates. They were not licensed real estate brokers nor did they hold themselves out as such.

Plaintiffs always participated in real estate ventures together. They typically participated as part of a group or syndicate. The sponsor of the venture was usually a client. Sometimes these clients and sponsors were real estate brokers. On occasion, plaintiffs acted as agent for a venture and collected rents and made disbursements for expenses. They kept a separate "real estate" bank account for these activities.

Plaintiffs' real estate holdings were extensive, their value considerable, and the turnover constant. The cash flow, representing income generated by properties and return of capital, shows that in the year 1953 cash receipts were $220,730.61; in 1954 they were $191,183.35; and in 1955, $245,897.25. During the years 1950-58, plaintiffs owned stock in 4 to 11 realty corporations and held from 35 to 57 different interests in realty partnerships and from 6 to 21 realty mortgages. Their ownership interest normally ranged between 15 and 25 percent. The adjusted cost basis of plaintiffs' total ownership of real property interests between 1950 and 1958 exceeded $397,000, and the fair market value of their interests was much more. During the period 1950-58, plaintiffs averaged 36 transactions annually, comprising purchases and sales of interests in realty, realty corporations or realty mortgages.

During the years 1953, 1954, and 1955 involved in this suit, plaintiffs sold 32 different realty interests. Of these, 15 had been held less than 6 months and only 5 had been held as long as 5 years. In the 7 years 1950-56, plaintiffs'

net income from the sale or disposal of their interests in real estate averaged $48,261.33 per year, and in 1 year exceeded $91,000. This may be contrasted to their $35,001.12 average annual net income from the practice of law during the same years. Their net income from other sources related to real estate is represented by interest on realty mortgages, dividends and salaries from realty corporations, and income from realty partnerships. Such income for the years 1950-56 averaged $44,919.39 per year. It is apparent that during these years profits on purchases and sales of interests in real property constituted plaintiffs' largest single source of income. Plaintiffs treated this income from sales of property held more than 6 months as capital gains but it was held to be ordinary income and taxable as such by the Internal Revenue Service. The amounts of taxes paid, deficiencies assessed and paid, and refunds sought are stipulated by the parties and are not in dispute here.

The statutory test and issue in this case is whether the real property sold by plaintiffs was held "primarily for sale to customers in the ordinary course of * * * [their] trade or business."[2] If it was so held, the profits were taxable as ordinary income. Otherwise, the lower capital gains rate applies. Such a problem is basically one of fact to be decided on the particular circumstances of the case, *Browne* v. *United States,* 174 Ct. Cl. 523, 356 F. 2d 546 (1966), and no one circumstance or factor is controlling. *Bauschard* v. *Commissioner,* 279 F. 2d 115 (6th Cir. 1960).

In *Malat* v. *Riddell, supra,* the Supreme Court resolved conflicts among certain Courts of Appeals with regard to

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[2] The relevant statutory provisions are, with respect to 1953, §§ 117(a)(1)(A) and 117(j)(1)(B) of the Internal Revenue Code of 939, and with respect to 1954 and 1955, §§ 1221(1) and 1231(b)(1)(B) of the Internal Revenue Code of 1954. These provisions of the 1939 and 1954 Internal Revenue Codes are identical insofar as pertinent to this case.

the meaning of the term "primarily" as used in the Internal Revenue Code of 1954. The Court said: "We hold that, as used in § 1221(1), 'primarily' means 'of first importance' or 'principally.'" The courts below had incorrectly construed primarily as meaning that a purpose may be "primary" if it is a "substantial" one.

In the instant case, the ultimate finding states, in part:

> * * * the weight of the credible evidence shows that they bought and held the subject property *primarily* for sale during the years in issue and during other relevant years. This is evidenced by the magnitude of their holdings, the extensive, frequent and continuous sales of the same, frequent short holding periods, the large amounts of money involved in these transactions, segregation of proceeds of sales for purchase of other real estate interests, and the profits derived from such ownership and sales as compared to plaintiffs' other income from the practice of law. Their testimony that their ventures in real estate were motivated primarily by interest in rental income and not in sales, is uncorroborated by the testimony of other co-owners and is contrary to the weight of the evidence. The evidence establishes, through the totality of their actual purchases and sales, that plaintiffs held the subject real estate *primarily* for sale in the ordinary course of their business or as an adjunct of the regular business operations of the partners. [Emphasis added.]

The regular business of the partners, of course, was the practice of law. Nowhere do the findings indicate that the word "primarily" has been construed in conflict with *Malat.* Trading in real estate is shown by the evidence to have been primarily or of first importance in the economic life of plaintiffs. The fact that they also practiced law and

had income from investments and other sources does not vitiate this fact. Individuals may conduct more than one business at a time and each will be taxed accordingly. *Crosswhite* v. *United States,* 177 Ct. Cl. —— (December 1966), collecting cases. The real question is whether buying and selling realty was one of the businesses of the partners. It was. More than that, it was their biggest business and the primary purpose of it was not investment but sales in the ordinary course of that phase of their business.

Plaintiffs urge that finding 28 is in conflict with *Malat* v. *Riddell, supra.* That finding states, in part: "The volume of plaintiffs' activities in the real estate market was such that their disposal of realty interests was motivated by a wide variety of factors to be expected in addition to or concurrent with a desire to make money or to avoid losing money." The finding then lists 12 of these factors and concludes with the following sentence, to which plaintiffs except:

> It is not possible from the evidence to determine how many of plaintiffs' transactions were influenced by the foregoing considerations to the complete exclusion of sales for profit. Both profits and losses were occasioned where some of the foreging factors were present but gains far exceeded losses over-all.

Plaintiffs say that the commissioner has "subjected plaintiffs to ordinary income taxation because he found they were not completely innocent of any intention to sell their property for profit." Plaintiffs say that this is a "new and radical legal standard." No such construction was intended. The last sentence of finding 28 is stricken, pursuant to the authority of the court's order of remand, as it seems to be misleading. The ultimate finding shows that it was never considered that there must be a complete

exclusion of the profit motive as a prerequisite to capital gains treatment. The subsidiary finding 28 is simply to show that although plaintiffs advance a variety of special circumstances in some sales to remove them from the class of ordinary sales for profit in the regular course of business, the evidence does not show to what extent, if any, such circumstances were the exclusive motivations for particular sales in a business of buying and selling real estate. The ultimate finding catalogues the reasons upon which it is based. All relevant factors are considered in each transaction to reach this conclusion. Plaintiffs have considered the subsidiary finding out of context.

Plaintiffs except, also, to finding 27 as a distorted account of plaintiffs' transactions, since it includes, for instance, those involving realty mortgages and purchases of realty. Plaintiffs say that the finding thus reflects an exaggerated picture of the volume of plaintiffs' transactions, as the categories mentioned do not reveal the extent to which plaintiffs traded in real estate. Plaintiffs, for instance, would include as one transaction both the purchase and sale of a particular piece of property regardless of the time elapsing between the two events. For plaintiffs' exception to be viable, the ultimate finding would have to be based alone on the total number of transactions shown in subsidiary finding 27. The ultimate finding shows this is not so. Many other factors are mentioned there. Finding 27 consists of seven columns, showing, respectively, realty purchased by plaintiffs, partnerships disposed of, realty corporations purchased and disposed of, realty mortgages purchased and disposed of, and the total of these transactions. The figures are largely stipulated. It is the total thereof which is the real basis of plaintiffs' exception. Plaintiffs say that these were not all "real estate transactions." It is believed that the finding is clear and that plaintiffs' attempt to explain away their transactions is not well taken, for

the list of their purchases and disposition of real estate interests shows the volume and identity thereof in all of its constituent parts.

Finally, in excepting to ultimate finding 36, plaintiffs insist that the evidence shows, sale by sale, the motives behind the sales in the years before the court and that it is clear the taxpayers held these properties only for rental income purposes and are entitled to be taxed at capital gains rates on the long-term appreciation of their income-producing investments. It has been found that these claimed motives are uncorroborated by the testimony of other co-owners and that plaintiffs' self-serving testimony is contrary to the weight of the evidence.[3] The ultimate finding summarizes the considerations which negate plaintiffs' argument.

The best that can be said for plaintiffs' contention is that there are some facts in the record consistent with both a purpose to buy rental real estate and to sell it at a profit. But, this does not help plaintiffs. It is possible to be both in the business of renting and selling the same kind of property and to be taxed at ordinary income rates. "* * * if the intrepreneur holds out his wares either for sale or for rental, the taxation of his business gain from sales does not depend upon a comparison of sales to rentals in the particular year." *Recordak Corp.* v. *United States,* 163 Ct. Cl. 294, 300, 325 F. 2d 460, 463 (1963). A dual or multiple purpose in buying real estate has not been outlawed nor do these other purposes mean that the property was not held, developed, and disposed of primarily in the ordinary course of trade or business. *Bauschard* v. *Com-*

[3] Plaintiffs observe in their reply brief that their co-venturers were often their legal clients and in oral argument said it would embarrass plaintiffs to call them as witnesses because of the lawyer-client relationship. Plaintiffs say the defendant could have called them. But, plaintiffs had the burden of proof. *Crosswhite* v. *United States, supra.*

missioner, supra. One must look to all the facts to find the primary purpose from which the tax consequences flow.

In plaintiffs' motion for leave to present further evidence, plaintiffs relied on *Municipal Bond Corp.* v. *Commissioner,* 341 F. 2d 683 (8th Cir. 1965), and the Tax Court on remand of that case in 46 T.C. 219 (1966), and say that under these authorities it is necessary for the trier of the facts, in applying the statutory test, to make specific findings of fact and conclusions of law with respect to each of the separate properties disposed of by taxpayers. Requested findings were not submitted upon this basis, which has not heretofore been used in the Court of Claims either before or after *Malat,* which says nothing on the subject. What happened in *Municipal Bond Corp.* is that the Court of Appeals, noting that the court below had used an erroneous interpretation of the word "primarily," was uncertain as to whether, at least with respect to some of the properties, the lower court's decision might have been based on wrongful interpretation of that word. So, the Court of Appeals directed the lower court to make findings with respect to each individual property sold and to consider the purpose for which it was acquired, the purpose for which it was held, the motive at the time of sale, and the method of sale. The Court of Appeals also observed that the operations of petitioner's other corporations would have no probative force in establishing its purpose for holding the real estate, except to the extent that it might be shown that the other corporations were acting as its agents.

The circumstances in *Municipal Bond Corp.* do not exist here. The Court of Claims has not misinterpreted the word "primarily" in the several cases it has decided where the statute with this word of art appears. This is not to say that in finding the facts the individual properties are ignored. *Tibbals* v. *United States,* 176 Ct. Cl. —— (June 1966). On the contrary, as in the instant case, each is

identified and all relevant factors have been considered with regard to each, including the purposes for which the land was acquired, the motive for selling, the method employed in selling, the income from the sales as compared with taxpayers' other income, the extent of improvements made to facilitate sales, the frequency and continuity of sales, and the time and effort expended by taxpayer in promoting sales. No one factor standing alone is conclusive, but rather all are taken into consideration. *Bauschard* v. *Commissioner, supra; Crosswhite* v. *United States, supra.* It is noted, also, that property initially purchased as an investment can later change from a capital asset to that which comes within the ambit of section 1221(1) of the Internal Revenue Code. *Thompson* v. *Commissioner,* 322 F. 2d 122, 127-28 (5th Cir. 1963). The reverse is also true. *Tibbals* v. *United States, supra.*

It is not necessary to make separate findings and conclusions on each separate tract where the circumstances of each have been considered and the number of properties and sales thereof is great and frequent. The normal course of taxpayers' business is not established by an individual transaction. It is the overall, factual situation that must govern a particular case. As was said in *Nadalin* v. *United States,* 176 Ct. Cl. ——, 364 F. 2d 431 (July 1966):

> • • • The isolation of and emphasis upon certain individual factors which constitute only threads in a complex situation should be guarded against, for it is the "total background of the transactions" and "the entire factual pattern of the case" that must govern.

Plaintiffs have not sustained their burden of proving as a fact that their real estate transactions in 1953, 1954, and 1955, which are in issue here, fell outside the broad scope of property held "primarily for sale to customers in the ordinary course" of their trade or business.

Appendix C

Recommended Conclusion of Law

Upon the foregoing findings of fact and opinion which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and their petition is dismissed.

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No. [illegible] 70

In the Supreme Court of the United States

OCTOBER TERM, 1956

DAVID B. GOODMAN AND THERESA L. GOODMAN, Estate of HERBERT S. GOODMAN, Deceased, GLADYS C. GOODMAN, EXECUTRIX, AND GLADYS C. GOODMAN, Surviving Wife; HARRY MABEL, Surviving Husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, EXECUTOR, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

[illegible],
Solicitor General,

[illegible],
Assistant Attorney General,

[illegible],
[illegible],

Department of Justice,
[illegible], D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1426

DAVID B. GOODMAN and THERESA L. GOODMAN; Estate of HERBERT S. GOODMAN, Deceased, GLADYS C. GOODMAN, Executrix, and GLADYS C. GOODMAN, Surviving Wife; HARRY MABEL, Surviving Husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, Executor, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners, as law partners,[1] specialized in the practice of real estate law. Since the mid-1930's, they participated in various real estate ventures sponsored

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[1] David Goodman, Herbert Goodman (here represented by his estate), and Harry Mabel comprised the partnership. We refer to them as "petitioners". The other petitioners are wives who joined in the pertinent tax returns.

by clients of the firm. Petitioners', personal involvement in selling and management was limited. However, they participated in the important decisions and gave their consent and approval to the sponsors' activities. Their coventurers valued petitioners' business judgment and experience in the buying and selling of real estate and some would not buy an interest unless petitioners joined. (Pet. 43-46, 50, 51, 56.)

By 1950, the petitioners' real estate holdings were extensive. The fair market value always exceeded $397,000 (Pet. 51-52). The partnership kept a separate bank account, a "real estate" account, into which it deposited proceeds from the sale of real estate interests. These proceeds were used for purchasing new real estate properties (Pet. 50).

There was a constant turnover, but at any given time during the period 1950-1958, petitioners owned interests in between 35 and 57 different realty partnerships, between 4 and 11 realty corporations, and between 6 and 21 realty mortgages. In the aggregate they had at least 61, and as many as 82, such interests (Pet. 51). Petitioners' ownership in each venture varied from 2 to 50 percent, but usually ranged between 15 and 25 percent (Pet. 46).

Each year during this period the petitioners participated in at least 23, and as many as 52, purchases and sales of real estate interests (Pet. 52). The annual average exceeded 36 transactions.[2] (See tabula-

[2] The lower figures given by the dissenting judges (Pet. 19, 33, 35, 38-39) include only properties that were held for more than six months and sold for a gain during the taxable years 1953, 1954 and 1955.

tion at Pet. 52.) Petitioners often held their realty for only short periods of time. For example, of the 32 different realty interests sold during the years 1953-1955 (the years at issue in this suit), 15 had been held less than six months, and 8 less than two years. Only 5 had been held as long as 5 years. (See tabulation at Pet. 47-49.)

During the seven-year period 1950-1956, petitioners' profits from the purchase and sale of real estate averaged $48,261.33 per year. Net income from this source never fell below $26,500 in any year. During this period the partnership received 37.7 percent of its net income from profits on purchases and sales of real estate, 35.0 percent from rents, salaries, and interest on mortgages, and 27.3 percent from the practice of law (see Pet. 53).

Petitioners reported as capital gains the profits from the sales of all real estate owned for more than six months. The Commissioner of Internal Revenue determined that petitioners held the properties primarily for sale to customers in the ordinary course of their trade or business, and that the profits were taxable as ordinary income (see Pet. 53). The deficiencies were paid. In a resulting refund suit, the Court of Claims, in a 4 to 2 decision, upheld the Commissioner's position.[3]

This case presents mainly questions of fact to which the court below applied correct legal principles. There is no conflict or other basis for review by this Court.

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[3] Petitioners' assertion (Pet. 11) that the Court of Claims decision was "three to two" is incorrect. Six judges participated, of whom two filed dissents. (Pet. 23, 32-42.)

1. The question whether a taxpayer holds property primarily for sale to customers in the ordinary course of his trade or business is to be decided upon a consideration of all the relevant circumstances of the particular case. *Bauschard* v. *United States*, 279 F. 2d 115 (C.A. 6); *Gamble* v. *Commissioner*, 242 F. 2d 586 (C.A. 5); *Austin* v. *Commissioner*, 263 F. 2d 460 (C.A. 9); *Crosswhite* v. *United States*, 177 Ct. Cl. 671, 369 F. 2d 989; *Gault* v. *Commissioner*, 332 F. 2d 94 (C.A. 2). Accordingly, the court below based its determination upon the magnitude of petitioners' realty holdings, their extensive, frequent and continuous sales, the frequent short holding periods, the large amounts of money involved in the transactions, the segregation of the proceeds of sales for purchase of other real estate interests, and the profits derived from such ownership and sales as compared to the partners' income from the practice of law. (Pet. 27-28.)

The court did not ignore petitioners' testimony that they were motivated primarily by an interest in rental income. It concluded, however, that the testimony was uncorroborated by other co-owners and contrary to the weight of the evidence. (Pet. 55-56.) Nor did the Court of Claims ignore petitioners' lack of management activity. One may be wholly passive and yet be engaged in the conduct of business through active partners and other agents such as was the case here. *Freeland* v. *Commissioner*, 21 A.F.T.R. 2d 903 (C.A. 9, decided March 8, 1968); *Tibbals* v. *United States*, 176 Ct. Cl. 196, 208, 362 F. 2d 266, 272; *Bauschard* v. *Commissioner*, *supra*, 279 F. 2d at 118; *Achong* v. *Commissioner*, 246 F. 2d 445, 447 (C.A. 9).

2. Petitioners must treat their gains as ordinary income if they held the properties "*primarily* for sale to customers in the ordinary course of [their] * * * trade or business * * *."[4] (Emphasis supplied.) In *Malat* v. *Riddell*, 383 U.S. 569 (1966), this Court ruled that "primarily" means "of first importance" or "principally," and not "substantially." The Court of Claims made explicit its adherence to this standard (Pet. 25, 27-28).

Petitioners assert (Pet. 13-15, 22), however, that under *Malat* property is not held "primarily for sale" in a business so long as the holder has some other primary income producing activity. There was no such issue and no such ruling in *Malat*. Similar arguments have been uniformly rejected, *Gamble* v. *Commissioner*, *supra*; *Frankenstein* v. *Commissioner*, 272 F. 2d 135 (C.A. 7), certiorari denied, 362 U.S. 918; *Achong* v. *Commissioner*, 246 F. 2d 445 (C.A. 9); *Nadalin* v. *United States*, 176 Ct. Cl. 1032, 1044, 364 F. 2d 431, 438-439; *Crosswhite* v. *United States*, *supra*, and the contention is no more persuasive here. A taxpayer would otherwise receive capital gains treatment on profits from sales in any business not singled out as his primary activity.

3. There is no conflict with (Pet. 12) *Austin* v. *Commissioner*, 263 F. 2d 460 (C.A. 9), or (Pet. 16, 21-22) *Municipal Bond Corp.* v. *Commissioner*, 341 F. 2d 683 (C.A. 8). Each case reflects the application of the same legal standard to different records. Although some facts in *Austin* are like some in this

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[4] 1939 Code Section 117(a)(1)(A) and 1954 Code Section 1221(1).

case, the situation as a whole is not. In *Austin*, a lawyer bought a number of unimproved lots in his community over a period of years without any consistent pattern of conduct and under circumstances which persuaded the court that they were random investments. He did not make the frequent and recurring purchases and sales of real estate, or consistently have income from sales, year after year, as petitioners did.

Municipal Bond Corp. does not hold, as petitioners urge, that the trial court must invariably make a specific finding about the taxpayer's purpose in holding each property sold. There will, of course, be cases where one person holds some real property for investment and other parcels for sale to customers. And in *Municipal Bonds* the court of appeals was convinced that the Tax Court's decision with respect to some of the property sold might have been predicated upon an erroneous interpretation of the word "primarily". This was the circumstance that resulted in a holding that "purpose or intention must be determined with respect to each tract and such purpose may vary with respect to the different tracts". (341 F. 2d at 689-690).

Here the Court of Claims recognized that individual properties may be held for different purposes.[5] It identified each property and considered all relevant factors (some of which it enumerated) with regard to each. It merely held that where the circumstances of each have been considered and the number of properties and sales is great and frequent, separate find-

[5] And see also *Tibbals* v. *United States*, 176 Ct. Cl. 196, 362 F. 2d 266.

ings as to the specific factors applicable to each are not needed.

Furthermore, as the court below noted, petitioners did not request such detailed findings (Pet. 30-31). The requested findings 16 and 63 in which petitioners claim to have described such details (Pet. 21), in fact set forth no detail not actually included in the court's own findings 19 and 28 (Pet. 47, 52-53).[6]

The petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

PHILIP R. MILLER,
KNOX BEMIS,
Attorneys.

JUNE 1968.

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[6] Petitioners' motion for leave to present further evidence after the Court of Claims remand to the Trial Commissioner to consider the case in the light of this Court's *Malat* decision (see Pet. 21-22) did not state what additional evidence was available to show that a particular property or properties were not held for the same purpose as the others. Even now petitioners describe no such evidence.

Copies of this motion and of petitioners' requested findings are on file with the Clerk of the Court.

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